Supreme Court, U.S.
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No. (1) 06-1606

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In The Supreme Court of the United States

STEPHEN AVILLA, and LEGAL AID SOCIETY OF SANTA CLARA COUNTY,

Petitioners,

v.

JAMES MCNAIR THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Sixth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:

> Is the legal aid corporation a "state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. §1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this Petition are the Legal Aid Society of Santa Clara County and Stephen Avilla (its employee/manager). The Legal Aid Society of Santa Clara County is a private, non-profit California corporation. It does not have a parent corporation. No publicly held company owns any interest in the Legal Aid Society of Santa Clara County. Neither the County of Santa Clara nor any other governmental agency has an ownership interest in or governance right over the Legal Aid Society of Santa Clara County.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Stephen Avilla and Legal Aid Society of Santa Clara County respectfully petition for a writ of certiorari to review the opinion of the Court of Appeal of the State of California, Sixth Appellate District in this matter.

OPINIONS BELOW

The unreported opinion of the Court of Appeal of the State of California, Sixth Appellate District, is reproduced as App.1a-42a. The unreported Order of the California Supreme Court denying the Petitioners' Petition for Review is reproduced as App. 43a. The unreported Judgment rendered in the Superior Court of California, County of Santa Clara is reproduced as App. 44a-45a, and its accompanying Statement of Decision is reproduced as App. 46a-62a.

JURISDICTION

The opinion of the Court of Appeal of the State of California was filed and entered on November 30, 2006. The order of the California Supreme Court denying the Petition for Hearing was filed and entered on February 21, 2007. This petition for Writ of Certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTES INVOLVED

This case involves the 14th Amendment of the United States Constitution (App. 63a), 42 U.S.C. §1983 (App. 65a), California Penal Code §987.2 (App. 66a), and California Penal Code §987.3.

The immediate pertinent part of the 14th Amendment of the United States Constitution is set forth as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The immediate pertinent part of 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The immediate pertinent part of California Penal Code §987.2 provides:

> (a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel, and in which counsel is assigned in the superior court to represent the person in a criminal trial, proceeding, or appeal, the following assigned counsel shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county: . . .
>
> (3) In a case in which the court finds that, because of a conflict of interest or other reasons, the public defender has properly refused.

California Penal Code §987.3 provides:

> Whenever in this code a court-appointed attorney is entitled to reasonable compensation and necessary expenses, the judge of the court shall consider the following factors, no one of which alone shall be controlling:
>
> (a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.
>
> (b) The time and labor required to be spent by the attorney.

(c) The difficulty of the defense.

(d) The novelty or uncertainty of the law upon which the decision depended.

(e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.

(f) The professional character, qualification, and standing of the attorney.

STATEMENT OF THE CASE

In the latter part of the 90's, San Jose was the site of trials of certain members of the Nuestra Familia ("NF") prison gang. Among other cases, four of the alleged members of this gang were tried and convicted of murder and conspiracy in1997 following a year-long trial. Robert Mares was originally charged (two counts of homicide with special circumstances allegations) in that case, but was severed from the four defendants who went to trial. No date was ever set for Mr. Mares' trial.

From October 1996 through the voluntary dismissal of the charges by the District Attorney in December 1999, Mr. Mares was represented by Respondent James McNair Thompson ("Respondent"), an independent San Jose attorney (Appendix ("App.") 4a.) The Public Defender's office was unable to represent Mr. Mares because of a conflict. (The term "conflict" means the conflict between the obligations a public defender would have to another person and those which he would owe to the defendant if he chose to represent both parties. *People v. Norman (1967) 252 Cal.App.2d 381, 402.*)

Respondent was originally appointed to represent Mr. Mares by the Court, acting at the suggestion of the Conflicts Administration Program, Inc. (App. 4a.) At that time, this group had a contract with the County of Santa Clara to provide representation to "conflicted" indigent criminal defendants. (App. 4a.) The Court was the ultimate authority in regard to fees in such cases.

Respondent continued to represent Mr. Mares. However, Conflicts Administration Program, Inc., did not continue its involvement. Pursuant to a new contract entered into in the Fall of 1996 between the County of Santa Clara ("County") and Petitioner Legal Aid Society of Santa Clara County, a non-profit California corporation ("Legal Aid"), Legal Aid began to supervise conflict appointments and representation. (App. 4a.) In early 1997, Petitioner Stephen Avilla ("Avilla" and collectively with Legal Aid, "Petitioners") was hired as the Attorney Coordinator of Legal Aid's Conflicts Division.

Part of Avilla's job was to review invoices to insure that public money was appropriately spent on these cases. Relieved of the usual supervision of the paying client, appointed counsel have sometimes strained the public budget. Budgetary factors and the absence of cost controls were among the factors which led to the institution of the San Mateo Private Defender program. See, for instance, San Mateo County Bar Association, The Private Defender Program - A Brief History, http://www.smcba.org/pdp.htm.

In May of 1999, Respondent had completed his representation of Geary German, a conflicts client unrelated to the NF cases. Petitioner Avilla questioned a portion of the bill. In response, Respondent filed an application for payment of attorney's fees in the criminal court. (App.4a -

5a.) The application for payment was ultimately decided in Respondent's favor in October 1999.

In late August 1999, Legal Aid filed written opposition to Respondent's application in the German matter. In a footnote to his Opposition, Avilla wrote "As previously explained, the Attorney Coordinator was operating in accordance with his understanding as to the contractual nature of the relationship between counsel and the prior Conflicts Administration. Since Counsel Thompson believes that the Court is the proper forum for determining a reasonable fee for conflict assignments, it would be inappropriate for the Attorney Administrator to continue the policy of interim payments on this and other Conflict Program assignments. Obviously, having endured this onslaught, armed with the new knowledge that, at the conclusion of Conflict cases the reasonableness of fees and rates and the Attorney Coordinator, himself, will be aggressively attacked by Counsel Thompson, all payments will be deferred to the conclusion of all other remaining conflict cases. At that point, a more orderly presentation can be made, hopefully, avoiding the unpleasantness of this proceeding." Legal Aid did not pay Respondent for his July interim billing in Mares. (App. 5a.)

In August 1999, Respondent filed an application for payment in the criminal court for his July 1999 billings in the Mares case. In September 1999, the Superior Court denied this motion. Respondent continued to submit interim billings on the Mares case through December 1999, when the charges against Mr. Mares were dismissed. These bills also were not paid.

In December 2000, Respondent filed his civil complaint in Superior Court Civil Division. The Complaint

originally sought civil rights recovery against the County, but this was dismissed on the County's Demurrer (App. 3a). Trial proceeded on a contract, statutory duty, and quantum meruit basis against the County and the Petitioners. Trial proceeded on the civil rights claim, but only against the Petitioners, not against the County. (App. 3a)

The basis of Respondent's civil rights claim is the allegation that the above footnote (App. 30a-31a.) established that Avilla and Legal Aid were retaliating against him with regard to the Mares case billings (his only other case where Legal Aid was involved) for his application made to the Court in the German matter, and was intended to deter Respondent from filing other applications for payment of disputed fees.

Trial was had to the Court, which ultimately entered Judgment in favor of Respondent on one cause of action, as a third party beneficiary of the County-Legal Aid contract, and awarded a reduced amount of the fees sought by Respondent. (App. 44a-45a). Judgment was for the Petitioners on the civil rights cause of action. The case was appealed to the State of California Sixth District Court of Appeals. (App. 3a-4a.).

The trial court dismissed the civil rights cause of action because Petitioners were not "state actors" and therefore, were not acting under color of state law (App.51a-54a). The Court of Appeals opinion is attached as App 1a-42a. The Court of Appeals mostly affirmed the Judgment, but reversed on the civil rights cause of action (App. 41a), declaring that Legal Aid was a state actor because it was fulfilling a traditionally exclusive state function. (App. 17a-32a). Petitioners sought review by the Supreme Court of the State of California, which was denied. (App 43a).

REASONS FOR GRANTING THE PETITION

This case involves the interpretation of federal law by the California state courts in a case where there is no direct California or federal precedent. The ruling of the Court of Appeals is inconsistent with federal precedent in analogous cases.

The issue is whether an independent, private non-profit legal aid agency is a "state actor" such that it is subject to liability under 42 U.S.C. Section 1983 for acts done while performing under an independent contract with a local governmental agency, in the course of its economic and supervisory relationship with non-employee lawyers whom it appoints and compensates to represent indigent defendants. Given that this affects the many agencies like Petitioner Legal Aid which serve the criminal justice system across the country, it is an important issue. (See, for instance, Los Angeles County. Bar Assoc., Indigent Criminal Defense Appointments Program, http://www.lacba.org/showpage.cfm?pageid=24 and San Mateo County. Bar Assoc., Private Defender Program - A Brief History, http://www.smcba.org/pdp.htm, for two examples of the tens of thousands of cases handled by just two of many such agencies.)

The initial issue is whether the "state actor" issue should be evaluated on the basis of (1) whether this is a function traditionally exclusively performed by the State or (2) whether the government is involved in the decisions and policies of Legal Aid involving payment of panel conflict attorneys. If the matter is to be resolved by application of the "traditional exclusive" test, then the further issue is whether the particular function – paying counsel – which is at stake here is within any traditionally exclusive government

function.

The two California courts (trial and appellate) which considered the instant case came to different conclusions as to whether such independent agencies are subject to civil rights claims by their appointed attorneys. The trial court evaluated the extent to which the government was involved in the decisions and policies of Petitioner Legal Aid. Since the government was undisputedly not involved at all in Legal Aid's fee payment decisions or relations with panel attorneys, the trial court decided that Legal Aid was not a state actor (App. 22a). The Sixth District Court of Appeal held that the key question was whether this is a function traditionally exclusively performed by the State. (App. 22a.) The Court of Appeals determined that it was, and held that the civil rights action could proceed to trial because this made Legal Aid a "state actor."

The issue is unsettled and important. The instant case presents the issue in simple and stark form: It is unquestioned that the government was not involved in Legal Aid's decision or policy, so the case rises and falls on the applicability of a "traditionally exclusive public function" test. Thus, this case presents an excellent vehicle for resolving the question.

So far as we have discovered, no case directly addresses the issue of whether a non-profit, non-governmental conflicts administration program is fulfilling a function that is traditionally exclusively performed by the state; whether, in such a situation, the correct test is the "traditionally exclusive public function" test; or how, if this test is appropriate, it should be applied.

This Court's ruling, undoing the incorrect approach

taken by the Court of Appeal, is important to the administration of justice throughout the States. The approach espoused by the Court of Appeals broadly exposes legal aid agencies to a multitude of suits for violations of civil rights by panel attorneys.

Today, it is an argument over behavior in the course of a fee dispute; tomorrow it will be appointed counsel taking the position that they cannot be supervised at all without invading their constitutional rights. Every time a program refuses an attorney admission to a panel, or consigns an attorney to a lower panel, there will be the possibility of civil rights litigation. Attorneys being removed from panels will doubtless claim the right to notice and a hearing. The discretion of independent non-profit agencies to manage their funds and their lawyers will be damaged.

Although most counsel are responsible, thorough, and competent, over-aggressive and/or overcharging counsel will be emboldened to sue or threaten to sue to put pressure on conflict administrators. Not only will that stress and damage legal aid agencies and their employees, who have potential personal liability, but respect for scarce public funds will be lost. Administrators will lose the ability to administer these matters.

The issue of whether all these conflict administration agencies, simply by virtue of the function they perform, are acting "under color of law" and thus subject to suit under 42 U.S.C. §1983, is an important issue of nationwide concern. This decision affects the ability of all these agencies to fulfill their historic role – providing competent lawyers at a price that will not break the public bank. If any dispute with a lawyer is potentially a federal civil rights case – and that is where the Court of Appeals ruling leaves us – then

administrators will be afraid to discipline lawyers and control fees.

Such liability contrasts markedly with the practice with regard to private, non-profit legal aid agencies that provide direct representation through their own lawyers (*Lefcourt* and *Graseck*). In that situation, the courts have clearly held that the defense-providing agencies are not state actors.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001) recognized explicitly that there can be policy values which outweigh factors tending toward a "state action" finding. The Court of Appeals dismissed these policy contentions, but they are very real. The values to be served by keeping Legal Aid's decisions private are significant. The administration of justice would be adversely affected if every fee dispute and appointment decision can be converted into a civil rights case by alleging retaliation or a due process violation. If treatment in a fee dispute is subject to civil rights attack, will that also be true of decisions to select particular lawyers, to place lawyers on particular panels, to determine rates, and otherwise to manage the situation? The management of conflict administration programs, already difficult, will be made substantially more so.

We submit that allowing §1983 liability to disturb the relations between conflict administration programs and panel attorneys will not serve the slightest public good; in fact, it will have many negative effects. Insurance will have to be purchased, if available, or reserves will have to be developed to defend such cases and pay judgments when necessary. The amount paid by local governments for this particular form of public service will go up. Relations between panel

attorneys and entities like Legal Aid will become adversarial and tainted with risk and the possibility of large judgments, including those for personal injury and punitive damage claims.

For the reasons stated both above and below, this Court ought to take up this matter, and decide that independent non-profit providers of panel attorneys for cases where indigent defendants cannot be represented by a public defender because of a conflict are not state actors in their relations with their appointed or panel attorneys.

I. The Correct Standard To Determine Whether Legal Aid Was a "State Actor" for Purposes of §1983 Was Whether The Government Was So Entwined, Involved, or Implicated In the Action Alleged to Have Created the Liability That The Action Could Fairly Be Considered the Act of the State.

Graseck v. Mauceri, 582 F. 2d 203 (2nd Cir. 1978) and *Lefcourt v. Legal Aid*, 445 F. 2d 1150 (2d Cir. 1971), both cited and relied on by the trial court, held in markedly similar circumstances that Legal Aid Societies that hire lawyers to provide direct services to indigent criminal defendants are not state actors when it comes to their relations with their employee-lawyers.

In both these cases, the legal aid society defendant contracted with a New York county to provide criminal defense for indigents. In each case, a legal aid attorney sued the non-profit entity under 42 U.S.C. §1983, alleging that his discharge was in violation of his Constitutional rights. Both cases held that the legal aid societies, in dealing with their employees as employees, were not state actors sufficient to

allow suit by an employee-lawyer under §1983.

Lefcourt v. Legal Aid held that:

> "The dismissal of a legal aid attorney by the Legal Aid Society of the City of New York was not performed under color of state law, notwithstanding the receipt of substantial government funds by the Society. The lack of governmental control over or interference with the Society's affairs was deemed pivotal." (Lefcourt, supra, 445 F. 2d at 1155.)

Graseck, supra, 582 F. 2d at 210, held that in the typical case, the question posed is relatively simple: *"Was the state 'involved not simply with some activity of* the institution alleged to have inflicted injury upon a plaintiff, *but with the activity that caused the injury*?" The Court went on to state that financial support was insufficient for "state actor"status; what was important was the degree of control:

> "It cannot be said that the Society acts under color of State law by virtue of the financial and other benefits which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs." *Graseck, supra*, 582 F. 2d at 208.

In the present case, it was clear that the County was not involved in supervising or controlling the activities of Legal Aid in any way. In particular, there were no facts adduced to show that the County had control over, regulated, or interfered with the manner in which Legal Aid conducted

its affairs with regard to the particular decision not to pay Respondent, nor **any** decisions about compensation of panel attorneys. The trial court found as a fact that Legal Aid was independent of the County in regard to issues of paying attorneys (App. 44a-45a and 22a). The Court of Appeals opinion did not challenge this finding. (App. 22a.)

Lefcourt dealt directly with the argument by the appellant therein "that the Society's activities constitute State action because of the function which the Society fulfills . . . because the defense of indigent persons accused of criminal activity is mandated by the Sixth Amendment and State law, the performance of that function by the Society constitutes an essential State function . . ." (445 F.2d at page 1155-56). In this regard, the Court said:

> Activities which are constitutionally essential to the functioning of the judicial process, including the representation of indigent persons accused of criminal activity, are doubtless among the most significant functions that any agency, public or private, might be called upon to perform. However, the representation of persons accused of crimes, far from being the function of any agency which 'traditionally serves the community' is normally performed for and by private persons. [The Court's embedded quote is from *Evans v. Newton*, 382 U.S. 296, at 302 (1966)]

Lefcourt went on to point to the independence of the Society from public control, then stated that "the hiring and firing practices of the Society as they relate to this case do not involved the manner in which the Society carries on its

public function." 445 F.2d at p.1156-57.

Referring to the Society as an agency that ". . . by contract has undertaken to make available to indigents legal services which otherwise governmental agencies might have to assume . . .," the Court went on to point out that:

> Although the State must see to it that indigents are provided with free legal counsel where they are constitutionally entitled to same, the State need not itself provide such counsel. To subject to the constitutional limitations on State action the hiring and firing and other practices of any private law firm which accepted court appointments to represent indigent claims, would be a highly unreasonable extension of the State action concept and §1983 and would quite transcend their intended scope. [445 F.2d at p.1157, fn.10]

Graseck and *Lefcourt* make it clear that a legal aid society that hires lawyers (or, per footnote 10 above, a law firm that hires lawyers and takes indigent appointments) can fire or discipline them without being subject to constitutional challenge. A conflicts administration operating by appointing independent lawyers from a panel has far less control over the appointed lawyers than a legal aid society where the attorneys are supervised employees. It has an equally tenuous relationship with the government – receiving funds but not being subject to control in regard to the details of the work to be performed. The idea that Legal Aid should be a state actor, while legal aid societies or law firms providing defense through their lawyer-employees are not, makes no sense.

Clearly, the Courts in both *Graseck* and *Lefcourt* held (1) that providing counsel to the indigent was not a traditional and exclusive public function, and (2) that the appropriate test was the level of control over the situation exercised, or which could have been exercised, by the state. We believe those cases – dealing as they do with the representation of indigents by lawyers and the relationship of a non-governmental representation agency with the lawyers who directly handle the defense – establish the principle that the appropriate test in such a case is the level of state involvement and control over the situation.

Logiodice v. Trustees of Maine Central Institute, 296 F.3d 22 (1st Cir., 2002) took up this subject in another context: School discipline by a private but publicly funded high school. In declaring the school was not a state actor, the Court noted:

> The reality is that we are all dependent on private entities for crucial services . . . Consider, for example, towns in which electric, gas, or bus service is privately provided under franchise. Thus far, the Supreme Court has declined to impose due process requirements on such institutions. *E.g.*, Jackson [v. Metro Edison Co., 419 U.S. 345 (1974)], 419 U.S. at 353-54 & n.9 . . . It perceives, as we do here, that state statutory and administrative remedies are normally available to deal with such abuses and that 'constitutionalizing' regulation of private entities is a last resort. [296 F.3d at p.30-31]

If the lower court ruling is allowed to stand, the effect is to "constitutionalize" the relations between private

conflicts administration entities and their panel lawyers, when state law remedies are perfectly adequate (as shown by Respondent's ability to recover his appropriately charged fees in the portion of the instant case based on contract).

The case which the Court of Appeals considered most apposite in this matter, on which it apparently based its holding, was *West v. Atkins*, 487 U.S. 42 (1988). In *West*, the plaintiff was an incarcerated prisoner in need of the most basic of services – medical care. The West plaintiff was in the involuntary custody of the state, which chose to fulfill its duty to provide medical care through a contracting doctor rather than an employee. Under those circumstances, where the imprisoned plaintiff had no choice of physician or medical care and was directly fulfilling the state's obligation to the prisoner, the Court held that the act or omission of the contract doctor *in rendering his professional services to the prisoner* would be deemed the act of the state.

It is notable that the *West* case dealt with the issue of whether the state's contractor had failed to fulfill the state's obligation to the prisoner, whereas the instant case has no such close relationship to the defense of Mr. Mares. Indeed, Respondent's argument was not that he was punished for something he did in the defense of Mr. Mares, but for something he did to collect his own fees in a different matter involving defendant German. ***

Accordingly, the *West* case provides no authority for considering Legal Aid's function in the criminal justice system to be a "traditionally exclusive" prerogative of the state.

If the posture here was that Mr. Mares, the defendant in the underlying criminal case, was suing Respondent for

violating his constitutional rights, then there would be an analogy to the *West* case (such a lawsuit might yet be prevented, however, under the dictates of *Polk County v. Dodson*, 454 U.S. 312 (1981)).

Here, however, it is as if the doctor in *West* was suing a private corporation that provided his services to the prisoner, and claiming that the private corporation, in its economic relations with the doctor, was equivalent to the state and therefore owed the doctor the duty of the state not to violate his civil rights. Similarly, Respondent Thompson is suing a private corporation that provided his services (in the sense of appointment and payment) to Mr. Mares as defendant. He is claiming that the private corporation, in its relations with the lawyer, owed him the duties the state would owe him in regard to civil rights, rather than the standard duties of a private company. As the trial judge in this case correctly perceived, neither the hypothetical situation where the doctor in *West* is the plaintiff against the private corporate provider of incarceration services, nor the current situation where the lawyer is the plaintiff against the private corporate appointer of lawyers, are sufficiently analogous to *West* to require its application.

Far from the helpless prisoner in *West,* the Respondent is a free actor who can choose what cases he wants to work on and can "go elsewhere" if he disagrees with the way they are handled by the conflicts administration. Rather than being in the care of the state, the Respondent is independent of it. In *West*, the plaintiff was in coercive custody – the most extreme exercise of state power over an individual short of the death penalty. No condition of that sort is present here.

Accordingly, the Court of Appeals used the wrong

test in determining that Legal Aid was a state actor. That decision should be reversed. When the appropriate test is applied, Legal Aid will not be a "state actor," because there is no governmental involvement or control in its decisions relating to attorney compensation.

II. Providing Counsel for the Indigent Is Not a Traditionally Exclusive State Function; Therefore, If That is The Appropriate Test of Who Is a "State Actor," Legal Aid Does Not Meet The Test.

If the traditional and exclusive public function test is the applicable test, the Court of Appeals erred in applying it. When reviewed in light of the facts and other case law, it is apparent that Legal Aid does not perform a traditional and exclusive public function.

The notion of what is a traditional and exclusive public function has been narrowed by a variety of holdings. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) held that the provision of vital electrical services to homeowners under a state granted and highly regulated monopoly was not an exclusive and traditional state function. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) held that providing special education did not fall into this category while *Morse v. North Coast Opportunities, Inc.*,118 F.3d 1338 (9th Cir. 1997) held it was not applicable to regular education. *Blum v. Yaretsky*, 457 U.S. 991 (1982) held nursing homes were not state actors.

As the Court noted in *Gerena v. Puerto Rico Legal Services, Inc.*, 538 F.Supp. 754, 759 (D. Puerto Rico, 1982), "Merely because the federal and state government have elected to act on behalf of the public interest does not transform the created services into ones which have

traditionally and exclusively been performed by government. In *Polk County v. Dodson*, 454 U.S. 312, [318] (1981) . . . (footnote omitted), the Supreme Court stated the following, with respect to services performed by public defenders in criminal proceeding: '[t]his is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.'"

As this Court said in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 158 (1978): "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" Furthermore, "it is not enough if the private entity is merely affected with the public interest; it must exercise powers 'traditionally exclusively reserved to the State.' *Id.* 419 U.S. at 352. . . " *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 384 (2d. Cir., 1980), *cert. denied*, 450 U.S. 916 (1981).

Based on this jurisprudence, the question is not merely whether providing counsel for the indigent was a function that is sometimes performed by the State, but whether it is a function which is exclusively reserved to the State, i.e., cannot be performed by others.

The Court of Appeals held, based apparently only on the Sixth Amendment to the U.S. Constitution and Penal Code §987.2, that paying reasonable compensation to conflict attorneys was the "exclusive prerogative" of the state (App. 22a-24a).

However, the Court of Appeals opinion conceded that there are organizations and attorneys that have long provided *pro bono* services for indigent defendants (App. 23a-24a). These agencies have a long history of providing free services to indigent criminal defendants. Accordingly, there is no

exclusivity in the provision of such services.

In light of that undeniable fact, it is inexplicable that the Court of Appeal could have stated that the Sixth Amendment and Penal Code §987.2 "impose exclusive duties" on the state to provide and pay for counsel for indigents. The fact of the matter is, paying for criminal defense is not an exclusive state function. It is a function that is provided (and has traditionally been provided) by both state and non-state entities, and for many years of our history, was the province entirely of either charity, or lawyers appointed for no compensation by courts[1].

We submit initially that without hearing evidence to support the "constitutional facts" on which its decision was based, the trial court could not have made a determination that the function performed by Legal Aid was a traditionally exclusive function of government. The trial court did not make such a finding (App. 22a-23a), of course, and therefore, it was not appropriate for the Court of Appeals to base its finding on underlying facts not established in the trial court.

The Court of Appeals' application of the traditionally exclusive public function test was incorrect under the factual circumstances shown here. Given the myriad of ways that our society has provided counsel to the indigent over the years, through private charity, volunteer lawyers, attorneys

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1. Respondent did not offer, and the Court of Appeals opinion did not reference, any evidence to establish Legal Aid's function was a traditionally exclusive State prerogative. The decision was apparently made on the basis of the statute, the Supreme Court holdings requiring counsel for the indigent, and nothing else.

appointed and serving without compensation, and advocacy organizations, it is simply not correct to say that the state has ever asserted "exclusive" control over this function.

In fact, the state is simply the agency of last resort, not the exclusive provider. Indigents charged with crimes look first to family and friends to pay for counsel, then explore non-profits, law school clinics, issue advocacy groups, and *pro bono* lawyers, and last come to the public defender or appointed counsel system.

To see how "exclusive" the system is, we have only to think about whether the state could or would "exclude" others from performing the function. Obviously, if I or any other lawyer were to set up a "free clinic" to defend the indigent, we would be applauded, not prevented. The state simply does not assert any exclusive right to compensate lawyers for the indigent. It has not done so traditionally, and it does not do so today.

The test is even harder to apply when we consider the "traditional" requirement. Unless our traditions start in the 1960's (when *Gideon v. Wainwright*, 372 U.S. 335, 342-343 (1963) and *In re Williams*, 1 Cal.3d 168, 174 (1969) established a right to state-paid indigent defense counsel), for most of our national life, defense of the indigent was not at all the province or prerogative of the State, and in fact, the government took the position that it was not required to participate in such a system or provide funds for defense.

So, the state's involvement in these matters is not exclusive now, and has not traditionally been so. Since both findings would be necessary to denominate Legal Aid as a state actor, the Court of Appeals decision on this subject should be reversed.

III. Even if Providing Counsel for the Indigent *Is* a Traditionally Exclusive State Function, The Separate Function of Administering Payment To and Determining How to Handle Fee Applications From Appointed Counsel Is Not and Has Not Been Traditionally Exclusively Performed by the State and Therefore, With Regard to This Particular Purpose, There Was No State Action.

Assuming *arguendo* that providing counsel for the indigent is a traditionally exclusive state function, nevertheless, that conclusion does not determine the issue here. Because an entity may be a state actor for some but not all purposes, one would have to examine whether the separate function of administering payment to counsel and determining how to handle fee applications is a function traditionally exclusively performed by the State.

In a case which turned "almost solely" on the public function approach to determining the existence of state action, the U.S. Ninth Circuit Court of Appeals held that "[A]n entity may be a state actor for some purposes but not for others." *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9th Cir., 1996). In *George,* the Ninth Circuit considered a case by an alleged "whistleblower" plaintiff against his former employer, a private correctional contractor operating under contract with the County of San Diego.

The defendant contractor conceded that "incarceration is a traditionally exclusive state function." However, the court reasoned that "[T]his assumption misses the point . . . The relevant inquiry is 'whether [Pacific's] *role as an employer* was state action' in George's case" [quoting from *Gorenc v. Salt River Project Agricultural Improvement & Power Dist.*, 869 F.2d 503, at 505 (9th Cir., 1989)].

In *George,* the Ninth Circuit held that George had not shown that his employer had become the government for employment purposes, even though his employment was for the purposes of rendering services in regard to an admittedly traditional and exclusive state function – the incarceration of offenders.

Likewise, there was nothing in the record of the trial or the trial court's findings to demonstrate that Legal Aid had "become the government" in performing its role of evaluating and dealing with fee applications from appointed counsel and approves or disapproves them. Indeed, the trial court found the reverse (App. 46a-47a).

Handling these matters is a part of Legal Aid's function which is equivalent to Pacific's function as an employer in *George*. Pacific was performing a public function in handling incarceration of offenders, but that did not mean that in its employment practices, it became the government or was performing a public function. Likewise, even if Legal Aid is performing a traditionally exclusive public function in appointing and providing counsel, it does not do so in its economic relations with the appointed attorneys. Therefore, actions in the course of those relations are not state action, notwithstanding the possibility that other functions of Legal Aid may fall into that category.

When Legal Aid decides whether to pay or contest payment of a fee claim by an appointed attorney, it is performing a quality control function. Pacific was trying to assure quality in the services it provides for the public, with public money. Legal Aid is trying to assure that appointed counsel are paid only for activities that are actually and reasonably performed in providing services to indigents, so

that scarce public funds are expended as efficiently as possible. It is fundamentally inequitable if f Legal Aid can be sued by Respondent for civil rights violations in its actions in disputed fee claims, but Pacific can dismiss its employee for blowing the whistle on legal and safety violations without incurring such liability.

The case of *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir., 1992) casts further light on why there was no state action here, as well as why our case should be distinguished from *West v. Atkins*. The court in *Wolotsky* first noted that *West* was concerned with a situation where the doctor was being sued based on his treatment of an injured inmate. The *Wolotsky* opinion went on to state:

> . . . West involves the professional judgment of a physician where the state was under a legal obligation to provide such professional services to its custodial inmates and the state had contracted with the physician to provide his professional services in fulfillment of the state's legal obligation. However, in this case, the dispositive issue is not plaintiff Wolotsky's services, but rather the decision to discharge him. An analysis of the decision to discharge plaintiff even in light of West shows that the decision was not made under color of state law. Although Portage Path in this case was under contract to the state, that contract gave the state no input in the personnel decisions of Portage Path because those personnel decisions were not directly related to any legal obligation of the state. 960 F.2d at 1337.

Similarly, in the instant case, Legal Aid's decision as to how to conduct itself with regard to a fee application is far removed from the services which the state was obligated to provide in the instant case – the defense services that were rendered to Mr. Mares. Certainly, Legal Aid's actions which allegedly give rise to liability "were not related to any legal obligation of the state." *Id.* In addition, like Portage Path in *Wolotsky,* the County-Legal Aid contract gave the state no input into "personnel" decisions such as the decision to pay or not pay Mr. Thompson.

The *George* and *Wolotsky* cases take us back to *Graseck* and *Lefcourt,* whose results maintained the appropriate dichotomy. It would create a severe inequity and discontinuity in the law if a private contractor providing public defender services could fire or discipline its attorney-employees without fear of civil rights liability, while Legal Aid could be sued under these same statutes for its conduct in dealing with fee claims by appointed attorneys. In assuring quality and reasonable economy in the services provided to indigent defendants, the private public defender and the conflict administrator are performing highly similar functions. They should be treated the same for purposes of the determination of whether their actions are state action.

When analyzed from this point of view, it can be seen that when Legal Aid exercises its "custodian of public purse" function to try to make sure that public money produces the appropriate public benefit, and is expended economically and wisely, it is not fulfilling any purpose that is traditionally exclusively performed by the state. Rather, like the private independent contractors providing prison services in *George* and *Wolotsky,* where the payment function is concerned, Legal Aid is not a state actor.

Like Petitioner Legal Aid, the agencies in *Graseck* and *Lefcourt* provide counsel for the indigent, spending scarce public funds to do so, proceeding through admitted members of the bar, whom they must conciliate, manage, and discipline. In fact, conflict administrators possess less power over their panel attorneys than do the other entities, where the attorneys are on staff.

Like Petitioner Legal Aid, the agencies in *George* and *Wolotsky* interact with prisoners who have constitutional rights at stake, and seek to manage and discipline their custodial employees to assure that they deliver quality services for the benefit of the public under their contract with the government.

In all four of the above cases, the private independent contractor that is assisting the state is held to be like any other company in regard to disciplining its employees. There is no applicable difference between their function and Legal Aid's, and no good reason for the Court to allow a dichotomy whereby Legal Aid is subject to civil rights liability while other similarly situated entities are not. Accordingly, it is appropriate that the Court of Appeals decision be reversed.

IV. Ruling on This Issue Would Make This Case Consistent With Applicable Federal Precedents.

The Court of Appeals opinion says that its decision on the civil rights issue was based on *West v. Atkins*, 487 U.S. 42 (1988). However, *West v. Atkins* does not control this matter and is distinguishable (see *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir., 1992) and associated discussion in Argument III, page 27)

The Court of Appeal disregarded the two closest

federal precedents: *Graseck v. Mauceri*, 582 F. 2d 203 (2nd Cir. 1978) and *Lefcourt v. Legal Aid*, 445 F. 2d 1150 (2d Cir. 1971) – the two cases most relied on by the trial court to decide the issue in favor of Petitioner. In *Schnabel v. Abramson*, 232 F.3d 83 (2nd Cir., 1999), the Court of Appeal reviewed its previous holdings in Graseck and *Lefcourt*, and reaffirmed those holdings. This is an issue of federal law, and if this case was rightly decided by the Court of Appeals, then *Graseck, Lefcourt,* and *Schnabel* are clearly wrong.

In *Graseck*, the fired attorney alleged that the courts pressured the Society to fire him because he was too aggressive in representing clients, and for other free speech activities. In *Lefcourt,* the fired attorney alleged that he advocated taking a much more aggressive role in the defense of criminal clients of the Society, in addition to other exercises of free speech, and was fired because of his views. In both cases, no state action was found to exist, and therefore, the Court upheld the dismissal of the civil rights claims, despite the fact that the views expressed and actions undertaken by the two attorneys went directly to the performance by the Societies of a very similar function to that performed by Legal Aid here, that is, providing defense counsel to indigents.

Yet under the reasoning of the Court of Appeals opinion in the instant case, the question in *Graseck, Lefcourt,* and *Schnabel* would be resolved in favor of liability – since the Legal Aid Society defendants were engaged in fulfilling a traditional and exclusive public function of providing indigent defense, they would be subject to civil rights liability as state actors in their dealings with their employees. While the Court of Appeals opinion purports to distinguish these cases, in fact it ignores them.

Accordingly, this Court's intervention in this case can maintain consistency in the law and avoid state applications of federal law which conflict with ruling Federal precedent.

CONCLUSION

Based on the foregoing arguments and authorities, we ask this Court to issue its Writ of Certiorari to examine these matters, and when examined, to reverse the holding of the Court of Appeals in this case.

Dated: May 18, 2007

Respectfully submitted,

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(2)

No. 06-1606

In The
Supreme Court of the United States

STEPHEN AVILLA, and LEGAL AID SOCIETY OF SANTA CLARA COUNTY,

Petitioners,

v.

JAMES MCNAIR THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Sixth District

APPENDIX

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APPENDIX A

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California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JAMES MCNAIR THOMPSON,

Plaintiff and Appellant,

v.

LEGAL AID SOCIETY OF SANTA CLARA COUNTY et al.,

Defendants and Appellants.

H028537
(Santa Clara County
Super. Ct. No. CV794735)

JAMES MCNAIR THOMPSON,

Plaintiff and Respondent,

V.

LEGAL AID SOCIETY OF SANTA CLARA COUNTY et al.,

Defendants and Appellants.

H028765
(Santa Clara County Super. Ct. No. CV794735)

STATEMENT OF THE CASE

In 2002, plaintiff James McNair Thompson (Thompson), an attorney, filed an action against Santa Clara County (County), Legal Aid Society of Santa Clara County (Legal Aid), and Stephen Avilla (Avilla), the coordinator of its Conflicts Program, asserting causes of action for breach of a statutory duty, breach of contract, quantum meruit, violation of his civil rights, and fraud. Thompson's primary claim was that Legal Aid had not paid him for services rendered to a indigent criminal defendant whom he was appointed to represent. After mandatory judicial arbitration, Thompson was awarded $54,100.00 plus statutory costs against Legal Aid and the County; he recovered nothing against Avilla. Thompson rejected the award and sought a trial de novo. (See Code of Civ. Proc. § 1141.20.)[1]

After a court trial, the court denied defendants'

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

motion to dismiss the entire action but granted judgment in their favor on Thompson's causes of action for breach of a statutory duty, quantum meruit, and violation of civil rights.[2] However, the court granted judgment for Thompson on his claim for breach of contract and awarded him $47,324 .87 against the County and Legal Aid. The court denied Thompson prejudgment interest.

Thereafter, defendants filed memoranda of costs that they incurred after Thompson elected trial de novo. (See § 1141 .21, subd. (a).)[3] Among other things, defendants sought $34,352.00 in expert witness fees. Avilla also sought fees as a prevailing party. (See § 1032, subd. (a)(4).) The court awarded costs except for the expert witness fees.

Thompson, Legal Aid, and the County appeal from the judgment. (H028537, James McNair Thompson v. Legal Aid Society of Santa Clara County et al.) Thompson claims the court erred in granting judgment to defendants on his claims for breach of a statutory duty, quantum meruit, and violation of civil rights and denying him prejudgment interest. Legal Aid and the County claim the court erred in denying their motion to dismiss the action.

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[2] Thompson's fraud action was eliminated by demurrer.

[3] Under section 1141 .21, subdivision (a), if a judgment after trial de novo is not more favorable than either the amount of damages awarded or the type of relief granted to the party by the arbitrator, that party must pay certain fees and costs incurred by the other party or parties unless the court finds that doing so would create substantial economic hardship.

Legal Aid and the County also appeal from the post-judgment order awarding costs. (H028765, James McNair Thompson v. Legal Aid Society of Santa Clara County et al.) They claim the court erred in refusing to award them expert witness fees.[4]

We reverse the judgment in the underlying action. We dismiss defendants' appeal from the post-judgment order.

FACTS

Thompson is a certified specialist in criminal law with extensive experience representing murder defendants in state and federal courts. In November 1996, Thompson was appointed to represent Robert Lee Mares (Mares) in a murder-with-special-circumstances case. At that time, the assignment of counsel for appointment and the payment of court appointed counsel was handled for the County by the Conflict Administration, Inc., which reviewed bills and submitted them to the County for payment. In 1997, Legal Aid took over performance of those functions for the Conflict Administration, Inc. under a contract with the County.

Through June 1999, Thompson submitted monthly bills for his work on the Mares case, and Legal Aid paid them. During that time, Thompson also submitted bills for his work in an unrelated murder-for-hire case called People v. German. Legal Aid reduced one of the German bills by

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[4]On our own motion, we ordered that the two appeals would be considered together for the purposes of briefing, oral argument, and decision.

thousands of dollars, and Thompson protested. He tried to resolve the dispute, but when his efforts failed, he filed a motion challenging the fee reduction. During the proceedings on the motion, Avilla indicated that it would be inappropriate to pay Thompson's bills because Thompson considered the court to be the proper forum for determining a reasonable fee. Ultimately, the court granted Thompson's motion and directed Legal Aid to pay him in the German case. Thereafter, from August to December 1999, Legal Aid declined to pay bills totaling $57,586.37 that Thompson submitted in the Mares case, which had ended in dismissal without prosecution. At trial, Antonio Estremera, directing attorney for Legal Aid, acknowledged that in his deposition, he testified that Avilla told him he was suspending payments to Thompson in the Mares case because of the fee dispute in the German case. However, Estremera could not recall the reason Avilla declined to pay Thompson's bills. Avilla testified that in January or February 2000, after a comprehensive review, he determined that those bills were vague, unreliable, and invalid. He did not believe that Thompson had performed all of the work reflected in the bills, and he thought a flurry of alleged work performed in the months before the Mares case was dismissed was unnecessary. He also thought that Thompson's performance was deficient. Avilla admitted, however, that he did not ask Thompson for a more detailed written description of the work represented in those bills, require Thompson to personally explain those bills, or personally convey his judgment about the bills to Thompson.[5]

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[5] Billing guidelines in Legal Aid's contract with the County authorize Legal Aid to review the performance of appointed counsel and the hours spent and billed. Under those guidelines, Legal Aid may

When his bills went unpaid, Thompson wrote a number of letters to Avilla, seeking and then demanding payment. He got no response and then filed a series of legal motions for payment and then this lawsuit.

In his claim for breach of contract, Thompson sought damages equal to the amount of his unpaid bills-$57,586.37-plus interest and costs from the County and Legal Aid. In his claim for breach of a statutory duty under Penal Code section 987.2, Thompson sought the same amount from the County. In his claim for quantum meruit-the reasonable value of his unpaid services-he sought $183,850.00 plus interest and costs from all defendants. In his claims for violation of civil rights (42 U. S.C. § 1983) and fraud, Thompson sought general and punitive damages, unspecified equitable relief, and fees and costs from Legal Aid and Avilla.

After mandatory arbitration, the arbitrator awarded Thompson $54,100.00, which Thompson rejected. The case proceeded to trial. Before trial, the court sustained a demurrer without leave to amend to the fifth cause of action for fraud. Thereafter the court, after trial, granted Thompson judgment on only his contract claim. The court awarded him fees for all of the work reflected in the unpaid bills, except

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require an attorney to "submit a detailed, written description of all work performed on the case or cases for the time period being reviewed." Alternatively, "the individual attorney involved may be required to personally appear and answer questions about the billings submitted."

for the time he spent litigating a motion to dismiss and an interim fee dispute with Legal Aid, which the court found not to be directly attributable to Mares's defense and neither necessary nor reasonable. The court found that the bills reflected work that was actually done, and, except for the collateral matters noted above, the work done was "reasonably necessary for the defense of Mr. Mares." The court further found that the surge of activity by Thompson before the Mares case was dismissed was reasonably explained by the fact that Thompson had just finished four murder trials. In calculating compensation, the court adopted the $70.00 per hour rate paid by Legal Aid and awarded Thompson $47,324.87.

THOMPSON'S APPEAL FROM THE JUDGMENT

Thompson contends that the court erred in rejecting his claims for breach of a statutory duty, quantum meruit, and violation of civil rights. He further claims the court erred in failing to award him prejudgment interest.

Breach of Statutory Duty to Pay under Penal Code Section 987.2[6]

Thompson's claim of breach of statutory duty was based on section 987 .2. That section provides, in relevant part, "(a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel, and in which counsel is assigned in the superior court to represent the person in a criminal

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[6] In this section only all further statutory references are to the Penal Code unless otherwise specified.

trial, proceeding, or appeal, the following assigned counsel shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county: [¶] . . .[¶] (3) In a case in which the court finds that, because of a conflict of interest or other reasons, the public defender has properly refused. [¶] . . .[¶] (b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in those cases."

In rejecting Thompson's claim, the court found that although the County had a statutory duty to compensate Thompson, it discharged that duty under section 987 .2, subdivision (b) by contracting with Legal Aid appoint and then pay appointed counsel.

Thompson claims that the County cannot immunize itself from liability by delegating its duty to pay appointed counsel to Legal Aid. Thompson further argues that section 987.2, subdivision (b) is inapplicable because it requires a contract "between the court and one or more responsible attorneys . . . " (§987.2, subd.(b).) Here the contract is between the County and Legal Aid, a corporation.

We need not discuss the propriety of the court's analysis because Thompson cannot demonstrate that the rejection of this claim was prejudicial.

Article VI, section 13, of the California Constitution provides that a judgment cannot be set aside "unless, after an

examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." "This fundamental restriction on the power of appellate courts is amplified by Code of Civil Procedure section 475, which states that trial court error is reversible only where it affects ' . . . the substantial rights of the parties . . . ,' and the appellant 'sustained and suffered substantial injury, and that a different result would have been probable if such error . . . had not occurred or existed.' Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred. [Citations.]" (Walker v. T.D., Inc. (1993) 12 Cal.App.4th 830, 833; Bullock v. Philip Morris USA, Inc. (2006) 138 Cal.App.4th 1029, 1045-1046.)

Franklin v. Appel (1992) 8 Cal.App.4th 875 guides our analysis in this case. There, the Franklins sued Appel, their attorney, asserting a variety of claims; Appel counter sued, asserting claims for, among other things, breach of a contingency fee agreement and quantum meruit. (Id. at p. 882.) The trial court rejected the Franklins' claims and also Appel's contract claim, finding that their contingency fee agreement was voidable due to the Franklins' failure to comply with statutory formalities. However, the court granted Appel judgment on his quantum meruit claim. (Id. at p. 883.) The appellate court found the trial court's contract ruling was erroneous and held that Appel should have received judgment and damages on that claim and not on his quantum meruit claim. However, because Appel's recovery on the latter claim reasonably approximated the damages he would have been entitled to on the contract claim, the court concluded that the error was harmless. (Id. at pp. 892-893.)

A similar reasoning applies here. Thompson was

appointed to represent Mares, and Legal Aid regularly paid his bills except for the last several, totaling $57,586.37, which, he alleged, reflected a "reasonable fees and costs" at a "reduced rate" for the services described. He alleged that the County's failure to pay that amount violated its statutory duty under section 987 .2 to pay "reasonable fees." He also alleged that the County and Legal Aid's failure to pay that amount also breached their contract, which they had entered into for his benefit. Thus, the record establishes that Thompson sought the same amount of damages under both claims, and $57,586.37 represents both a reasonable fee under section 987.2 and the amount due under the contract for that time and those costs.

Next, we note that even if the court had granted judgment in favor of Thompson on both causes of action, Thompson could have recovered only once. Moreover, under the statutory claim, Thompson sought to recover only from the County. The judgment on his contract claim was against both the County and Legal Aid.

Finally, in awarding damages on the contract claim, the court deducted fees for the time Thompson spent on a motion to dismiss and his fee dispute with Legal Aid. The record reveals that Thompson had asked the court to dismiss the criminal case against Mares because (1) Avilla had discussed the death penalty in the Mares case with the district attorney without Thompson's knowledge and (2) Avilla had failed to pay Thompson's interim fee requests. At trial below, Thompson and defendants disputed whether the time spent on those matters was reasonably necessary to Mares's defense. In determining the issue, the trial court had all relevant pleadings before it. Steve Defilippis, a specialist in criminal matters, testified for defendants and noted that

sometime after Avilla spoke to the district attorney, the prosecution did not seek the death penalty.

Given the favorable turn of events, Defilippis opined that Thompson's motion to dismiss was not meritorious and could have been counterproductive. Therefore, it was not reasonably necessary to defend Mares.

The court agreed with Defilippis and reduced Thompson's contract recovery. Thompson does not directly claim that the court erred in reducing his contract damages. He argues that under his statutory claim, he should have been entitled to recover for the motions. We disagree. The court's finding that the motions were not reasonably necessary would have applied with equal force in determining fees on Thompson's statutory claim. Accordingly, even if Thompson had prevailed on that claim, it is not reasonably probable the court would have awarded fees for the motions.

Thus, as in Franklin v. Appel, supra, 8 Cal.4th 875, Thompson here obtained as much under the judgment as he would have obtained had he prevailed on both his contract and statutory claims. In other words, it is not reasonably probable Thompson would have obtained a more favorable judgment had the court granted him judgment on his statutory claim. Thus, defendant cannot demonstrate that the alleged error resulted in a miscarriage of justice. (See People v. Watson, supra, 46 Cal .2d at p. 836.)

Quantum Meruit

After Thompson rested, the court granted defendants' motion for judgment on the quantum meruit claim. (See §631 .8.) The court found no evidence to support a finding that

$183,500.00-the amount Thompson claimed-represented the reasonable value of the services for which he had not been paid. The court further found that as a public entity, the County could not be sued for quantum meruit; and as an agent for Legal Aid and not a party to the alleged quasi-contract, Avilla could not be held personally liable.

A judgment entered after the granting of a motion for judgment under section 631.8 is the same as a judgment entered after a trial at which both sides present evidence. (San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal.App.4th 517, 528.) Thus, we view the evidence in the light most favorable to the respondents and accept the trial court's factual findings if supported by substantial evidence. (Howard v. Owens Corning (1999) 72 Cal.App.4th 621, 630-631; Charles C. Chapman Building Co. v. California Mart(1969) 2 Cal.App.3d 846, 853.) Moreover, we will uphold the judgment if correct on any theory applicable to the case regardless of whether the court relied on it. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 18-19; accord, People v. Brown (2004) 33 Cal.4th 892, 901.)

"A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice." (Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 Cal.App.4th 1410, 1419.) Where legal services have been provided without a valid contract, the lawyer may generally recover the reasonable value of the services in an action in quantum meruit. (Flannery v. Prentice (2001) 26Cal.4th 572, 588-589; Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal.App.4th 990, 996.) We review a determination of the reasonable value of services following

trial of an action in quantum meruit under the substantial evidence test because the question is primarily factual. (See Ford & Vlahos v. ITT Commercial Finance Corp. (1994) 8 Cal.App.4th 1220, 1235 [the question of reasonableness "is intensely factual" and depends on the surrounding circumstances]; Haines v. Bechdolt (1965) 231 Cal.App.2d 659, 665 [amount affirmed if supported by competent evidence]; Malvich v. Rockwell (1949) 91 Cal.2d 463, 465 [same].)

Thompson sought compensation for the same hours and costs for which he sought to recover under his statutory and contract claims. He testified that generally he is opposed to flat-rate contracts, such as the contract that governed compensation for appointed counsel. Normally, he charges private clients $250.00 per hour. We assume that the difference between the $183,500.00 he sought in quantum meruit and the $57,586.37 he sought under his contract and statutory claims roughly reflects the difference between hourly rates of $250.00 and $70.00, the rate paid by Legal Aid.

Although Thompson said he charges private clients the higher rate, he testified that under his appointment in the Mares case, he accepted Legal Aid's rate. Moreover, for most of time he represented Mares, he billed his time and accepted payment at that rate. Thompson's testimony does not compel a finding that the rate he charges private, solvent clients must, or even should, be used to calculate the reasonable value of services rendered to indigent clients under appointment. (See Hill v. Superior Court (1956) 46 Cal .2d 169, 171 [reasonable fee in private transaction with solvent client not necessarily measure of reasonable fee for court appointed counsel].) Consequently, the court was not

required to find that the reasonable value of his unpaid services was $183,500.00, and its finding implies that it rejected Thompson's $250 rate as reasonable.

Thompson argues that even if the court rejected the amount of his claim, it should have allowed him to recover some lesser amount rather than simply rejecting his quantum meruit claim entirely. We agree. Thompson's failure to prove that the reasonable value of his unpaid services was $183,500.00 does not defeat an otherwise meritorious claim for quantum meruit or preclude the court from awarding a lesser amount. We note, however, that after the court granted defendants judgment on that claim, the case proceeded on Thompson's statutory contract and statutory claims for reasonable fees. Apart from Thompson's testimony, there was no other evidence to establish that the reasonable value of services provided to indigent criminal defendants under an appointment was, or should be, some amount greater than the $70.00 rate paid by Legal Aid. On the other hand, that rate is generally accepted by appointed counsel and specifically was accepted by Thompson as the rate for determining the reasonable value of his services in the Mares case. Indeed, in his other claims, Thompson alleged that compensation based on that rate represented "reasonable fees and costs."

Under the circumstances, Thompson again cannot demonstrate prejudice from the rejection of his quantum meruit claim. Given the evidence introduced by defendants concerning the reasonable value of Thompson's unpaid services, Thompson's acceptance of an appointment and payment at the $70.00 rate, and the court's finding concerning non-compensable hours spent on the motion to dismiss and interim fee dispute, we do not consider it

reasonably probable that the court would have adopted an hourly rate higher than $70.00 and awarded Thompson more than he recovered on his contract claim.[7]

Moreover, we agree with the trial court that Thompson could not recover against the County on a theory of quantum meruit. In Lundeen Coatings v. McKinnon (1991) 232 Cal.App.3d 816, the court explained that "[a]s a general rule, a public entity cannot be sued on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations." (Id. at p. 831, fn. 9.) In support of this rule, the Lundeen court cited Miller v. McKinnon (1942) 20 Cal.2d 83, where the court held that a contractor could not recover the reasonable value of services provided to the county on a

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[7] Curiously, we observe that in his reply brief Thompson asserts that "the County is statutorily liable for the 'reasonable value' of attorney's fees under Penal Code §987.2" and "this is the same standard as the measure of damages in an action sounding in quantuin meruit . . . ." (Italics in original.) Thompson alleged that the amount he sought under his statutory claim was a reasonable fee . Accordingly, if, as discussed above, Thompson would not have been entitled to recover any more on this statutory claim than he recovered on his contract claim, it follows from his own reasoning that he would not have been entitled to recover more under his quantum meruit claim than he was entitled to recover on his statutory claim or that he actually recovered on his contract claim, regardless of the hourly rate he charges his private clients.

quantum meruit theory, where the contract under which the services were provided was void and unenforceable because it failed to comply with statutes requiring competitive bidding. (But see Marshall v. Pasadena Unified School Dist. (2004) 119 Cal.App.4th 1241, 1259-1260 [noting that Miller was superceded by Public Contract Code, §5110, which permits recovery of reasonable cost of work performed in good faith under a contract despite defects in the competitive bidding process].)

Thompson argues that the general rule does not apply where, as here, there are no issues concerning competitive bidding, and he is not seeking to recover on a contract that is void and unenforceable. However, Thompson cites no authority for the proposition that the rule is so limited. On the contrary, it has been cited and applied in other contexts. (E.g., Los Angeles Equestrian Center v. City of Los Angeles (1993) 17 Cal.App.4th 432, 448-449; Janis v. State Lottery (1998) 68 Cal.App.4th 824, 830.)

We also agree with the trial court's conclusion that Thompson could not recover from Avilla because Avilla was not a party to any implied-in-law or quasi-contract and, therefore, could not be held personally liable under a quasi-contract theory. The court's finding and the judgment imply that Avilla acted only in his capacity as the agent of Legal Aid. Indeed, the court found that "Avilla has been the attorney coordinator of Legal Aid's appointed counsel program since its inception," and it is undisputed that Thompson was appointed by Legal Aid. Thus, the judgment in Avilla's favor simply reflects the general principal that an agent is not liable for the performance of a contract that he or she makes on behalf of a disclosed principal. (See Rest. 2d Agency, § 320, 328; 3 Witkin Summary of Calif. Law (10th

ed. 2005) Agency, § 195, pp. 264-265; Lippert v. Bailey (1966) 241 Cal.App.2d 376, 382 [where an authorized agent names his principal and contracts in his name and does not exceed his authority, the principal is responsible and not the agent]; Filippo Industries, Inc. v. Sun Ins. Co. of New York (1999) 74 Cal.App.4th 1429, 1442 [same, quoting Lippert].)

Thompson argues that Avilla's liability "arises from his direct participation rather than derivatively from his role as manager of the conflicts program." However, Thompson's assertion is inconsistent with the express and implied findings of the court to the effect that Avilla was acting in his capacity as coordinator of the appointed counsel program and agent for Legal Aid. Thompson cites no allegations in the complaint or evidence at trial that support a finding that Avilla acted in his individual capacity in appointing Thompson or that Avilla somehow personally benefitted from Thompson's appointment. Thus, even though Avilla was the person who rejected Thompson's bills, he did so as an agent of Legal Aid. Therefore, his failure to pay did not render him personally liable for their payment.

Deprivation of Civil Rights

In his complaint, Thompson alleged that defendants' wrongful refusal to pay him was retaliatory punishment for his successful motion for fees in the German case and was intended to deter him and others from filing such motions. He also alleged that Avilla made false and malicious reports about him to the State Bar of California.

To state a claim under Title 42 United States Code section 1983 (section 1983), "a plaintiff must allege the violation of a right secured by the Constitution and laws of

the United States, and must show that the alleged deprivation was committed by a person acting under color of state law."[8] (West v. Atkins (1988) 487 U.S. 42, 48 (West).) "Retaliation by a public official for the exercise of a constitutional right is actionable under [section 1983], even if the act, when taken for different reasons, would have been proper." (American Civil Liberties Union of Maryland v. Wicomo County (1993) 999 F.2d 780, 785.)

The trial court rejected this claim for three reasons. Relying primarily on Lefcourt v. Legal Aid Society (2d Cir. 1971) 445 F .2d 1150 (Lefcourt) and Graseck v. Mauceri (2d Cir. 1978) 582 F.2d 203 (Graseck), the court found that Legal Aid (and by extension Avilla) did not act under color of state law. Citing Huang v. Board of Governors of the University of North Carolina 902 F.2d 1134, 1140, the court further found that the fee dispute, which provoked the allegedly retaliatory action, was not a matter of public concern sufficient to show a violation of First Amendment

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[8] Section 1983 provides, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

rights. The court also found that the refusal to pay Thompson did not cause any injury because it did not intimidate him or otherwise chill the exercise of his First Amendment rights. Rather, the court observed, "[P]laintiff appeared emboldened by Legal Aid's refusal to pay and his legal activities intensified."

We first examine the court's finding of no state action. Although Legal Aid is not a state agency or corporation and Avilla is not a state employee, claims under section 1983 are not limited to conduct by a state agencies, officers, or employees "'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute.'" (Lugar v. Edmondson Oil Co., Inc. (1982) 457 U.S. 922, 941, quoting Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144, 152.)

In determining whether Legal Aid's conduct involved state action, we may consider a variety of circumstances. In Brentwood Academy v. Tennessee Secondary School Athletic Ass'n (2001) 531 U.S. 288, 296, the United States Supreme Court held that "a challenged activity may be state action when it results from the State's exercise of 'coercive power,' [citation], when the State provides 'significant encouragement, either overt or covert,' [citation], or when a private actor operates as a 'willful participant in joint activity with the State or its agents,' [citation]. We have treated a nominally private entity as a state actor when it is controlled by an 'agency of the State,' [citation], when it has been delegated a public function by the State, [citations], when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control,' [citation]." (Italics added; see Lugar v. Edmonton Oil Co., supra, 457 U.S. at p. 939 [characterizing relevant

circumstances as the "'public function'" test; the "'state compulsion'" test; the "'nexus'" test; and the "'joint action'" test].)

Pertinent to our analysis here is West, supra, 487 U.S. 42. In West, the court held that Doctor Atkins, a private doctor, acted under color of state law by providing medical care on a part time basis to inmates in a prison hospital under contract with the state. (Id. at pp. 48-57.) The court noted that under the Eighth Amendment, the state had a constitutional obligation to provide adequate medical care to inmates, and, to satisfy that duty, the state had hired private doctors, including Doctor Atkins, and deferred to their professional judgment. Moreover, only those doctors were authorized to treat inmates, and inmates could only see those doctors. Under the circumstances, the court found that Doctor Atkins was a state actor, "'clothed with the authority of state law.' [Citation.]" (Id. at p. 55.)

The court acknowledged that the doctors were independent contractors, who were free to exercise their professional discretion and judgment and work for other employers at the same time. However, the court explained that the determinative focus was on Doctor Atkins's function within the state system and not the precise terms of his employment. (West, supra, 487 U.S. at pp. 55-56.) Moreover, "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their [constitutional] rights. The State bore an affirmative obligation to provide adequate medical care to [the inmate]; the State delegated that function to [the private doctor]; and [he] voluntarily assumed that obligation by contract." (Id. at

p. 56, fn. omitted; cf. also Edmonson v. Leesville Concrete Co. (1991) 500 U.S. 614 [exercise of peremptory challenge by private litigant in private civil suit constituted state action]; Terry v. Adams (1953) 345 U.S. 461 [exclusion from a private political organization which dominated Texas electoral politics constituted state action].)

Just as the Eighth Amendment obligates the state to provide medical care to prisoners, the Sixth Amendment obligates the state to provide counsel to indigent criminal defendants. (Gideon v. Wainwright (1963) 372 U.S. 335, 342-343; In re Williams (1969) 1 Cal.3d 168, 174; People v. Lara (2001) 86 Cal . App.4th 139, 150 ["absolute duty to appoint counsel to represent an indigent defendant"].) In accordance with that constitutional mandate, Penal Code section 987 establishes procedures for the determination of indigency and appointment of counsel, and Penal Code section 987.2 requires that the state pay appointed counsel for their services. Indeed, in Cunningham v. Superior Court(1986) 177 Cal.App.3d 336 (rev. den. May 8, 1986), the court explained that "[i]t is a legitimate state function to assist the poor [citation], but, under the Constitution, this goal cannot be accomplished at the expense of one particular group of people. It is a denial of equal protection when the government seeks to charge the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons." (Id. at p. 348.) Thus, the court concluded that requiring a defense attorney to represent indigent defendant without compensation would violate his or her right to equal protection. (Id. at pp. 348-352.) Accordingly, we conclude that the appointment and payment of reasonable fees for services rendered by counsel are public functions.

It is undisputed that the County delegated its constitutional and statutory duty to appoint and pay counsel to Legal Aid. The contract between the County and Legal Aid expressly acknowledged the County's legal duty, and the County expressly agreed to fund Legal Aid to perform those functions. Therefore, in light of West, supra, 487 U.S. 42, we conclude the in refusing to pay Thompson, Legal Aid acted "under color of" law. (§ 1983.)

In its decision, the trial court distinguished West, supra, 487 U.S. 42 on the ground that prison inmates could see only the doctors hired by the state. On appeal, Legal Aid explains the court's finding, arguing that unlike the inmates, Thompson was free to choose which cases he worked on and could withdraw if he disagreed with how Legal Aid managed appointed counsel.

However, this is a faulty distinction. The decisive factor in West was the public nature of the function performed by the doctor. That inmates could see only doctors hired by the state showed that the public function performed by Doctor Atkins was the exclusive prerogative of the state. That here Thompson was free to reject an appointment is irrelevant because once he accepted the Mares appointment, he, like the prison inmates in West, had to look exclusively to the state's contractor, in this case Legal Aid, for compensation.

We acknowledge that the trial court's findings that (1) Legal Aid is an independent nonprofit organization, (2) the County has no contractual role in determining the assignment of or reasonable value of services provided by appointed counsel, and (3) the County never became involved in Thompson's fee dispute with Legal Aid are supported by

substantial evidence. However, the pertinent analytical focus is not on the particulars of the contractual relationship between the County and Legal Aid but rather on the function performed by Legal Aid. Legal Aid's independence from County does not negate the indisputable facts that the County has constitutional and statutory duty to appoint and compensate counsel, it delegated that duty to Legal Aid, and Legal Aid exclusively performed that function for the County.

We also recognize that to make out a civil rights claim, one must show more than that a private actor is serving a public function. "[T]he question is whether the function performed has been 'traditionally the exclusive prerogative of the State.' [Citations .]" (Rendell-Baker v. Kohn (1982) 457 U.S. 830, 842, italics in original.)

There are organizations and attorneys who provide, and have long provided, pro bono services for indigent criminal defendants. However, the Sixth Amendment and Penal Code section 987.2 impose exclusive duties on the state to appoint and pay for counsel when an indigent defendant comes to court unrepresented. And paying reasonable compensation when counsel is appointed is now the exclusive prerogative of the state.

Legal Aid notes that before 1941, there was no provision for the payment of court-appointed counsel by the state, and appointed counsel often served without pecuniary compensation under their professional duty to defend the defenseless and oppressed. (See Lascher v. State (1966) 64 Cal .2d 687, 689.) Given this history, Legal Aid argues that the payment of appointed counsel is not a traditional public function. However, if paying appointed counsel reasonable

compensation was not a traditional public function before 1941, it is now and has been since the enactment of former section 987a, the predecessor to section 987.2. (See stats. 1941, ch. 451, §1.)

We turn now to the trial court's reliance on Lefcourt, supra, 445 F.2d 1150 and Graseck, supra, 582 F.2d 203 to support its finding of no state action. In Lefcourt, a legal aid society under contract with New York City to assign counsel for indigent defendants fired the plaintiff, a staff attorney, during his probationary period. He then sued the society for reinstatement. He claimed he was fired for talking to his colleagues. (Lefcourt, supra, 445 F.2d at pp. 1151-1152, 1154.) On appeal, the court found no state action. Although the city funded the society, the society was a wholly private institution, and neither the state nor the city had any control or influence over how the society managed its staff of employees. Moreover, the court explained that the society's practices in hiring and firing staff did "not involve the manner in which the Society carries on its public function." (Id. at pp. 1156-1157.)

In Graseck, supra, 582 F.2d 203, a staff attorney was discharged by the Legal Aid Society because he could not work with colleagues or follow established rules, he exercised poor judgment, and he was repeatedly gone from assigned areas. A judge had previously criticized his performance and conduct and reported it the society. (Id. at pp. 205-206.) The attorney sued, claiming that together the judicial criticism and the close working relationship between the society and the state judges reflected sufficient state involvement in his dismissal to constitute state action. (Id. at p. 207.) On appeal, the court followed Lefcourt and found no state action because (1) the government had no authority

to control, regulate, or interfere with the Society's internal affairs, decision making, and employment practices; and (2) the judicial criticism was insufficient involvement in the attorney's dismissal to transform it into state action. (Id. at pp. 208- 212; see Schnabel v. Abramson (2d Cir. 2000) 232 F.3d 83 [citing Lefcourt, dismissal of staff attorney not state action]; see also Housand v. Herman (2d Cir. 1979) 594 F.2d 923 [citing Lefcourt, staff attorney's allegedly inadequate representation of indigent defendant not state action for purposes of civil rights action].)

The trial court's reliance on Lefcourt and Graseck is misplaced. Neither case involved the performance by a legal aid society of a state's duty and obligation to appoint and compensate counsel. Rather, those cases involved managerial decisions concerning the composition of their staffs, which fell within the exclusive purview of the independent societies. Questions about whom an independent entity should hire and fire do not implicate the state's constitutional or statutory obligations. Those decisions are purely internal, employment matters, over which the institutions exercised exclusive, independent, and complete control.[9]

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[9] The trial court also cited Blum v . Yaretsky (1982) 457 U.S. 991. There, the court concluded that decisions by private nursing homes concerning the transfer of Medicaid recipients did not involve state action because those decisions were based on independent medical evaluations, for which the state is not responsible . (Id. at p. 1006.) Here, however, the County is obligated to provide reasonabie compensation for services rendered by appointed counsel and remains ultimately responsible to ensure that function is performed.

On appeal, Legal Aid claims that even if the delegation of the County's duty tends to show state action, there are more important policy factors against finding state action that would be served by keeping its decisions concerning fee disputes with counsel "private." (See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, supra, 531 U.S. at p. 303 ["Even facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances"]; e.g., Polk County v. Dodson (1981) 454 U.S. 312 [state employment ordinarily conclusive of state action not so when full-time county public defender is representing a client].) Legal Aid argues that allowing every fee dispute to become a potential civil rights suit would adversely affect the administration of justice; it would chill administrators from exercising their right to manage public funds and caseloads; and it would create an adversarial relationship between management and appointed counsel that would undermine the representation of indigent defendants. We are not convinced that the sky will fall.

Precluding civil rights actions would have no tendency to keep fee disputes private because a fee dispute can already spawn a lawsuit based on claims of breach of contract or quantum meruit. Moreover, allowing civil rights actions will not chill management or create an adversarial relationship any more than a contract or quasi-contract cause of action would. Rather, here, for example, not allowing the action could tend to chill the exercise of constitutional rights by other attorneys appointed to represent indigent criminal defendants.

We now turn to the court's findings that Thompson's

fee dispute was not a matter of public concern sufficient to implicate Thompson's civil rights; and the allegedly retaliatory refusal to pay him caused no injury or harm because it did not stop him from exercising his First Amendment rights.

These findings reflect a misunderstanding concerning the basis of Thompson's claim and the nature of his injury. A claim of retaliation for exercising the First Amendment rights of free speech and expression does require a showing that the subject matter of the speech or expression and cause of retaliation concerned a matter of public concern. (See Connick v. Myers (1983) 461 U.S. 138, 146.) However, here, Thompson claimed retaliation not for exercising his right to speak freely but for exercising his separate constitutional right of access to courts to seek redress for his grievances.[10]

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[10] The right of access to the courts has been found in the First Amendment to the Constitution of the United States, which prohibits Congress making laws that abridge not only "freedom of speech" but also the right of the people "to petition the Government for a redress of grievances ." (U.S. Const., 1 st Amend.; Cal.. Motor Transp. Co. v. Trucking Unlimited (1972) 404 U.S. 508, 510; Jersey v. John Muir Medical Center (2002) 97 Cal.App.4th 814, 821; Bullock v . City and County of San Francisco (1990) 221 Cal.App.3d 1072, 1090; see Cantwell v. Connecticut (1940) 310 U.S. 296, 303-304 [1st Amend, applicable to states via 14th Amend.].)

The right of access to the courts without regard to type of relief sought has also been found to be implicit in the right to due process provided by the Fourteenth

In this context, Thompson's reason for seeking access, i.e., the subject matter of his court action-need not involve a matter of public concern.[11] To make out his claim, Thompson had to show only that he exercised his right of access to the courts, he suffered an adverse action by Legal Aid, the exercise of his right was at least a substantial or motivating factor behind Legal Aid's action, and the adverse action constitutes an injury that would likely chill a person of ordinary firmness from engaging in the protected activity. (See Bd. Of County Comm'rs v. Umbehr (1996) 518 U.S. 668, 685; Hoover v. Radabaugh (6th Cir. 2002) 307 F.3d 460, 466; Gill v. Pidlypchak (2d Cir. 2004) 389 F.3d 379, 380-382.) He did not have to show that he was personally

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Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." (Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 430, fn. 5; California Teachers Assn. v. State of California (1999) 20 Ca1.4th 327, 338-339.)

And the right of access has been found to be one of the "privileges and immunities" accorded citizens under article IV of the United States Constitution. (Ryland v. Shapiro (5th Cir. 1983) 708 F.2d 967, 971.)

[11] However, insofar as the failure to pay Thompson for his services implicates the ability of the County to satisfy its constitutional obligation to provide counsel for indigent criminal defendants and the rights of appointed counsel to equal protection, one could reasonably argue that Thompson sought access to the courts for reasons that did involve matters of public concern.

deterred after the adverse retaliatory employment action. (Gill v. Pidlypchak, supra, 389 F.3d at p. 383-384; see Wishnatsky v. Rovner (8th Cir. 2006) 433 F .3d 608) 612, fn. 2; Smith v. Maschner (10th Cir. 1990) 899 F.2d 940, 947-948.) Thus, although Legal Aid's action did not silence Thompson or keep him from going to court, Thompson introduced evidence that could have supported a finding that Legal Aid's failure to pay him was an adverse action that caused him direct pecuniary harm; Thompson's going to court to challenge Legal Aid's reduction in his fees was a substantial or motivating factor behind the adverse action; and the adverse action would likely chill a person of ordinary firmness, including other attorneys who accept appointments, from exercising their right of access to the court for similar grievances.

In sum, we conclude that the court erred in entering judgment in favor of defendants on Thompson's civil rights claim. Moreover, we do not find the error harmless as was the court's allegedly erroneous rejection of Thompson's claims for breach of statutory obligation and quantum meruit. This is so because the civil rights action sought general and punitive damages along with unspecified equitable relief, fees and costs. (See 42 U.S.C. 1988; County of Los Angeles v. Superior Court (1999) 21 Cal.4th 292, 297 ["[R]emedies available in section 1983 actions may include equitable relief as well as compensatory and punitive damages']; e.g., Trump v. Superior Court (1981) 118 Cal.App.3d 411, 414-415 [punitive damages].)

The record before us does not necessarily preclude a finding of punitive damages. Indeed, in finding a breach of contract by Legal Aid, the court made numerous findings concerning the way in which defendants failed to perform.

In rejecting Legal Aid's claim that Thompson's unpaid bills were "'unjustified, bloated, unreasonable, and obscene,' the court found that before Thompson sought access to the court in the German case, Legal Aid had routinely accepted and paid the bills he had submitted in the Mares case, and those bills were essentially identical to those rejected in description and categorization.

The court noted that "Avilla's own testimony at trial acknowledged that some items in the disputed bills were valid. Yet, inconsistent with Avilla's practice of making interim payments for undisputed items pending review of questionable ones, [Thompson] has yet to be paid even for the work Avilla did not contest." The court further noted that under its own written policies and procedures, if Legal Aid questioned items on the bills, Legal Aid through Avilla was supposed to request a more detailed description of the services performed or require Thompson to personally appear and answer questions. "Yet Legal Aid never asked for a discussion or an explanation concerning the disputed bills prior to this lawsuit. Legal Aid simply did not pay the bills. In fact, Legal Aid did not even directly inform plaintiff that it had decided not to pay the Mares bills. The only hint of Legal Aid's intention came by way of a footnote in a court brief filed in the German litigation, another case concerning another billing dispute."[12]

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[12] The court was referring to a footnote in a memorandum that Avilla had submitted in connection with the German fee dispute. That memorandum is not part of the record before us apparently because the records in the German case were sealed. However, before those records were sealed, Thompson quoted the footnote verbatim in a motion to compel payment of

The court also rejected defendants' claim that it had not wrongfully failed to pay Thompson's claim. In particular, Legal Aid noted that guidelines required Legal Aid to pay Thompson within 15 days from "'the submission . . . of a valid authorization of claim" bill. Legal Aid argued that the 15 day period did not commence until after it determined the validity of Thompson's claim, which it had not yet done. However, the court opined that the guideline could not reasonably be construed "to give Legal Aid carte blanch as to how much time it could take to review a submitted bill." Rather, the guideline reflected a concern for prompt processing and payment. "Legal Aid did neither. At the very least, the amount of the time that Legal Aid may take to review a bill must be subject to a standard of reasonableness. The court finds that Legal Aid and Avilla did not act reasonably in this regard."

Last, the court found that Thompson's actions in the German case and his hostility toward Legal Aid and Avilla did not justify or excuse defendants' failure to follow their own guidelines and procedures. On the contrary, the court found that his hostility should have caused defendants to act with greater care in processing his claims in the Mares case. The court noted that Avilla had a number of disciplinary options available if Thompson refused a request for additional information about his bills. "Avilla, however, did not avail himself [of] the tools at his disposal. Instead, Legal

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fees in the Mares case. That motion is part of the record here because defendants introduced it as an exhibit at trial. In the footnote, Avilla indicated that he was suspending interim payments to Thompson because Thompson thought the court was the proper forum for determining a reasonable fee.

Aid basically encouraged plaintiff to file a lawsuit."

Given the evidence and the findings summarized above, we find it reasonably probable that Thompson would have received a more favorable judgment on his civil rights action and obtained relief, i.e., punitive damages and/or equitable relief-over an above what he recovered on his contract claim. (People v. Watson, supra, 46 Cal.2d at p. 836.)

Prejudgment Interest

Thompson claims the court erred in denying him prejudgment interest under Civil Code section 3287 (hereafter section 3287).[13] He argues that his damages were

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[13] Section 3287 provides, "(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state. [¶] (b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed ."

"capable of being made certain by calculation" (§ 3287, subd. (a)) because the amount simply involved multiplying the number of hours by the hourly rate of pay.

The certainty requirement of section 3287 has been reduced to two tests: (1) whether the defendant actually knows the amount owed or (2) whether the defendant could have computed that amount from reasonably available information. (Wisper Corp. v. California Commerce Bank (1996) 49 Cal.App.4th 948, 960; Chesapeake Industries, Inc. v. Togova Enterprises, Inc. (1983) 149 Cal.App.3d 901, 911.) In order to come within this rule, the calculation must have been a relatively simple matter, such as multiplying the number of board-feet of lumber hauled by the average weight of lumber per board-foot (West v. Holstrom (1968) 261 Cal.App.2d 89, 97), or calculating the amount due under an expense report that listed all items claimed and attached supporting vouchers. (Charlton v. Pan American World Airways (1953) 116 Cal.App.2d 550, 554-555.) Interest is generally denied where more is required, as where an accounting was needed to determine the sum due (Chesapeake Industries, Inc. v. Togova Enterprises, Inc., supra, 149 Cal.App.3d at p. 908), or where plaintiff itself arrived at several different tabulations of the amount owing. (Conderback, Inc. v. Standard Oil Co. (1966) 239 Cal.App.2d 664,690-691.)

"[W]here a defendant does not know what amount he [or she] owes and cannot ascertain it except by accord or judicial process, he [or she] cannot be in default for not paying it." (Levy-Zentner Co. v. Southern Pac. Transportation Co. (1977) 74 Cal.App.3d 762, 799.) Thus, where the amount of damages cannot be resolved except by verdict or judgment, damages are not certain, and prejudgment interest is not

authorized by section 3287, subdivision (a). (Wisper Corp. v. California Commerce Bank, supra, 49 Cal.App.4th at p. 960.)

Here, Legal Aid not only knew the amount it owed Thompson but could have computed it based on the information he supplied, which was the same type of information Legal Aid relied on when they paid him. That the parties disputed whether all of the services that Thompson rendered in the Mares case were reasonably necessary did not render Thompson's claim unliquidated, for once the court resolved the dispute, the calculation of fees was a simple matter. (Cf. Rabinowitch v. California Western Gas Co. (1967) 257 Cal.App.2d 150, 161.) Indeed, in George v. Double-D Foods, Inc. (1984) 155 Cal.App.3d 36, 46-47, the court upheld prejudgment interest in a quantum meruit action for the reasonable value of services rendered by the plaintiff

Similarly, the fact that plaintiff sought more than the court awarded is not grounds to deny prejudgment interest. (Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal .2d 396, 408; National Farm Workers Service Center, Inc., v. M. Caratan, Inc. (1983) 146 Cal.App.3d 796, 811.)

Under the circumstances, therefore, we conclude that the court erred in denying prejudgment interest.

DEFENDANTS' APPEAL FROM THE JUDGMENT

Defendants contend that the court erred in denying

their motion to dismiss the entire action.[14] Relying on Solin v. O'Melveny & Meyers, LLP (2001) 89 Cal.App.4th 456 (Solin), defendants claim that the action was barred by Thompson's assertion of work-product and attorney-client privilege concerning the documentary information they claim was necessary and essential to substantiate his claim for compensation. They argue that without that information, they could not evaluate the work Thompson said he performed to see whether it was done or determine whether it was reasonably necessary. They further argue that without the information, the court lacked a basis to determine Thompson's credibility and the reasonableness of his claims.[15]

In Solin, supra, 89 Cal.App.4th 451, Solin, an attorney, consulted Cohen, a criminal lawyer at the O'Melveny Law Firm, concerning (1) whether he faced

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[14] Defendants made the motion to dismiss before trial, but the court deferred ruling on it until after trial and did so in its statement of decision.

[15] Defendants sought calendars, diaries, or DayTimers from which he constructed his bills; newspaper clippings; contemporaneous notes of the documents, files, and transcripts he said he reviewed ; indices he constructed; documents that he obtained during discovery that contained his notes; documents concerning conversations, correspondence, conferences with the district attorney's office; and notes and records concerning his investigation plan and his conversations and contacts with investigators; and documentary evidence related to billings and payment for his services to other clients.

potential criminal liability for continuing to represent certain clients; (2) how to deal with those clients' claim that the fees they had already paid him were really a loan; and (3) how to structure a new relationship that would best protect him against a future fee dispute because those clients were now unwilling to pay fees for the five-year renewal term in advance or to provide security for annual payments. (Id. at p. 455.) Later, Solin sued O'Melveny, alleging that Cohen was incompetent and his advice inadequate. He claimed that Cohen failed to alert him to civil cases that would have entitled him to collect a substantial sum from his clients for the balance due on the remaining term of their retainer agreement. In response, Cohen asserted that they did discuss the payment terms of the retainer agreement but only insofar as they affected the criminal law advice he gave. (Id. at p. 456.) Before trial, Solin's clients and the parties entered a stipulation of confidentiality. Solin's clients later sought either dismissal of the action or a protective order barring disclosure of any privileged and confidential information, which would be necessary to prosecute and defend against the action. The trial court dismissed the action. (Ibid.)

On appeal, the court affirmed. It concluded that O'Melveny could not effectively defend itself without reference to the clients' privileged and confidential information. The court found that resolution of the parties' dispute hinged on the actual substance of the discussions between Solin and Cohen and the legal advice sought and given. (Solin, supra, 89 Cal.App.4th at p. 456.) The court explained that "the central disputed issues in this case center on what Solin disclosed and why, what legal advice O'Melveny rendered to Solin and why, how Solin's disclosures shaped and influenced that legal advice, and how Cohen's criminal law advice affected Solin's decision to

structure the retainer agreement with the Clients." (Solin, supra, 89 Cal.App.4th at p. 466.) The court opined that the necessary exclusion of privileged information about the discussion "would give a distorted view of the Solin/O'Melveny consultation, and would keep from the jury the facts that Solin determined that O'Melveny needed to know in order to render a legal opinion, and the facts on which O'Melveny based its legal advice, and would deprive O'Melveny of its right to cross-examine its accuser on the "critical issue' of Solin's credibility." (Id. at p. 463.) Moreover, the necessary exclusion of evidence that could otherwise bolster O'Melveny's defense and credibility would, in effect, give plaintiff an unfair advantage over O'Melveny. (Id. at p. 463.)

The court considered it "fundamentally unfair for a client to sue a law firm for the advice obtained and then to seek to forbid the attorney who gave that advice from reciting verbatim, as nearly as memory permits, the words spoken by his accuser during the consultation. Simple notions of due process counsel against such a procedure." (Solin, supra, 89 Cal.App.4th at p. 463.) The court observed that although Solin was not invoking his own privilege vis-a-vis O'Melveny, "the fact that the Clients' Secrets must be protected from disclosure would yield precisely the same result: Solin would be permitted to sue his lawyers for malpractice, yet gag O'Melveny in defending the charge by preventing full disclosure of all matters counseled upon. This result is especially unsatisfactory where, as here, we are faced with this issue only because Solin chose to divulge the "evidentiary details" of his Clients' Secrets rather than withholding those details from his communications to Cohen and presenting a hypothetical scenario that would have permitted him to obtain the legal advice he sought without

disclosing client confidences." (Id. at p. 464.)

Dismissing an entire case is a "drastic action" (General Dynamics Corp. v. Superior Court(1994) 7 Cal.4th 1164, 1190), and here, we conclude that the trial court properly declined to do so.

The trial court found, and we agree, that Solin is distinguishable. Unlike evidence of the discussions in Solin, which both parties agreed took place, the record here does not establish that the evidence defendant sought even existed. In this regard, the trial court perceptively noted that although Thompson resisted defendants' discovery requests by asserting privilege, defendants never tested the adequacy of their broad requests or the propriety of Thompson's response by moving to compel production. Defendants decided instead to simply acquiesce. However, the trial court opined, and we agree, that a party should not be allowed to disregard discovery procedures and remedies and later complain that they are unable to defend without certain allegedly privileged material and seek dismissal under Solin. As the trial court observed, "[N]o party would move to compel a further response. Instead, the propounding party would simply allow a seemingly unjustified objection to stand and then demand the ultimate sanction of dismissal."[16]

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16 At trial, the court asked why defendants did not move to compel production. Counsel said they were not required to bring a motion and did not want to force the production of information that might expose Mares to new charges. Counsel also opined that "its not our obligation to help [Thompson] prove his case" and suggested that it would have been "malpractice" to move

Next, even if the documents existed when defendants

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to compel documents that could have supported Thompson's claims.

On appeal, however, defendants argue that a motion to compel would have been fruitless and expensive. ~(RB 14-15)~ We disagree. For example, defendants sought "all calendars, diaries, and DayTimers" for the periods covered by the unpaid bills. Thompson objected to the request on grounds that it violated his right to privacy, the attorney- client privilege, and the work-product privilege; would not lead to the discovery of admissible evidence; and was burdensome and oppressive. Insofar as that material might conceivably have contained confidential communications, those communications would have been privileged. (See Evid. Code, §§ 952, 954.) However, defendants could, and should, have tested the other grounds for Thompson's broad objections. As to those grounds, the court could have held an in camera hearing to determine their propriety; explore the possibility of redacting nondiscoverable private, personal, and/or work- product information; and decide whether production was necessary for the defense . (See § 2018.030, subds. (a) & (b) [work-product]; e.g., Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal .App.4th 110, 121 ["in camera inspection is the proper procedure to evaluate the applicability of the work product doctrine to specific documents, and categorize whether each document should be given qualified or absolute protection"].)

first requested them, that evidence was not equivalent in relevance or importance to the privileged evidence in Solin. There, Solin's malpractice claim hinged on what he and Cohen talked about and that information was not only the most probative evidence but also the most crucial evidence on the primary issue at trial: the propriety if Cohen's advise. Indeed, the case could not be resolved without reference to what was said. Here, even if some, or most, of the material that defendants sought was privileged or otherwise confidential, that material was not the only, the essential, or the most probative evidence concerning whether (1) Thompson performed the work he said he did or (2) whether that work was reasonably necessary to the Mares case. Nor did a resolution of the case hinge on that material defendants sought. Indeed, at trial, Thompson introduced the unpaid bills and supporting documentation that he had submitted to Legal Aid. The latter contained abbreviated descriptions of the type of work performed, the date it was performed, and the amount of time spent performing it. By Avilla's own admission, he was able to evaluate Thompson's claims based on this information and ultimately determined that some of the items were valid and others were not without requesting any additional information, clarification, or explanation from Thompson. Furthermore, at trial, defendants had ample opportunity to cross-examine Thompson about his bills and the details reflected in the supporting documentation in ways that could have avoided privilege objections. However, defendants made no effort to do so.

The trial court also rejected defendants' claim that it needed the extensive amount of material they had sought in discovery to resolve the case. The court had no difficulty evaluating Thompson's credibility, deciding whether defendants breached the contract, and if so, determining what

work was reasonably necessary for the defense of Mares and the amount of fees to award for that work. As the court observed, "[t]he resolution concerning the reasonableness of fees does not require the degree of intrusion sought by defendants. Indeed, the appropriateness of fee requests is routinely evaluated by the courts and by opposing counsel without the need to invade the client-attorney privilege, as many documents relevant to this inquiry do not fall within the scope of the privilege." We share the trial court's view. If, as defendants claim, the type of information that defendants sought was essential to establishing whether certain work was performed and reasonably necessary, then in many cases attorney fees could not fixed without a waiver of privilege.

In sum, defendants have not shown that the trial court abused its discretion in denying their motion to dismiss the entire action.

DISPOSITION

The judgment in H028537 is reversed and the matter remanded for further proceedings, including proceedings on Thompson's civil rights claim and an award of prejudgment interest. Thompson is entitled to costs on appeal.[17]

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[17] Our reversal of the judgment necessarily nullifies the court's ruling on defendants' post-judgment motion for costs under section 1141 .21 because Thompson is entitled to a new trial on his civil rights claim and may recover additional damages and equitable relief that make the judgment more favorable than the arbitration award. Accordingly, we dismiss defendants' appeal from that post-judgment order.

We dismiss the appeal in H028765. Each party is to bear its costs.

RUSHING, P.J.

WE CONCUR:

ELIA, J.

MIHARA, J.

APPENDIX B

Court of Appeal, Sixth Appellate District - Nos. H028537/H028765

S149337
IN THE SUPREME COURT OF CALIFORNIA
En Banc

JAMES MCNAIR THOMPSON, Plaintiff and Appellant,

v.

LEGAL AID SOCIETY OF SANTA CLARA COUNTY, et al., Defendants and Appellants,
AND COMPANION CASE.

Request for judicial notice denied.

Petition for review DENIED.

Supreme Court FILED

February 21, 2007

Frederick K. Ohlrich Clerk

_____
Deputy

GEORGE
Chief Justice

APPENDIX C

(ENDORSED)
FILED
DEC 29, 2004

KIRI TORRE
Chief Executive Officer
Superior Court of California,
County of Santa
Clara

By DIANA O'HAGIN

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JAMES McNAIR THOMPSON,

Plaintiff,

Case No. 1-00-CV 794735

JUDGMENT

STEPHEN AVILLA, LEGAL AID SOCIETY OF SANTA CLARA COUNTY, COUNTY OF SANTA CLARA, and DOES 1-100

Defendants.

_____/

Trial to the Court began on July 19, 2004. Plaintiff James McNair Thompson ("plaintiff") appeared in *propria*

persona. John Marshall Collins, Esq., and Peter A. Furst, Esq., appeared on behalf of defendants Stephen Avilla ("Avilla"), Legal Aid Society of Santa Clara County ("Legal Aid"), and County of Santa Clara ("County").

Judgment is in favor of defendants on the second, third, and fourth causes of action. Plaintiff shall take nothing on these causes of action.

Judgment is in favor of plaintiff and against defendant Legal Aid and defendant County on the first cause of action. Plaintiff shall recover from defendant Legal Aid and defendant County, jointly and severally, the amount of $47,324.87. Prejudgment interest is not awarded.
DATED: December 29, 2004

_____
JUDGE OF THE SUPERIOR COURT

THANG NGUYEN BARRETT

APPENDIX D

FILED
DEC 07, 2004

KIRI TORRE
Chief Executive Officer
Superior Court of California,
County of Santa
Clara

By_____

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JAMES McNAIR THOMPSON,
Plaintiff,

Case No. 1-00-CV 794735

STATEMENT OF DECISION

STEPHEN AVILLA, LEGAL AID SOCIETY
OF SANTA CLARA COUNTY, COUNTY
OF SANTA CLARA, and DOES 1-100

Defendants.
_____/

I.

BACKGROUND

This lawsuit involves a fee dispute between plaintiffs and Legal Aid over the final billings submitted by plaintiff in his representation of Robert Lee Mares in a court-appointed capital case.

Plaintiff has been practicing law since 1975 and is a bar certified specialist in criminal law. He has extensive experience in both the state and federal system representing defendants accused of murder. Two federal judges had appointed him to represent capital defendants under the federal "learned counsel" statute.

In November of 1996, the court appointed plaintiff to represent Mr. Mares, who was being charged with two counts of murder with special circumstances. If convicted, Mr. Mares would face either death or life imprisonment without possibility of parole. At the time of plaintiff's appointment to the *Mares* case payment of court-appointed counsel was processed through the Conflict Administration, Inc. ("Conflict"). Conflict would review the bills and submit them to the County for payment. In early 1997, Legal Aid took over this function from Conflict. Subsequently, Legal Aid and the County entered into a contract whereby the former was given an annual fixed sum to administer all aspects of the appointed counsel program, including direct payment to appointed counsel. Avilla has been the attorney coordinator of Legal Aid's appointed counsel program since its inception.

Through June of 1999, plaintiff submitted monthly bills for his work in the *Mares* case. These bills were paid

without incident. Troubled waters, however, lay ahead.

In July of 1999, plaintiff filed a motion in court challenging Legal Aid's reduction of his fees in the unrelated matter of *People v. German*, a murder-for-hire case. Eventually the court ruled in favor of plaintiff and ordered Legal Aid to restore the payment.

In August of 1999, plaintiff submitted a bill in the *Mares* case. It went unpaid. Subsequent bills for October, November, and December suffered the same fate. Legal Aid's lack of action on plaintiff's bills triggered an avalanche of legal motions by plaintiff, culminating in this lawsuit.

The *Mares* case was dismissed in December of 1999 on motion of the district attorney.

II.

PROCEDURAL HISTORY

Trial to the Court began on July 19, 2004. Plaintiff James McNair Thompson ("plaintiff") appeared in *propria persona*. John Marshall Collins, Esq., and Peter A. Furst, Esq., appeared on behalf of defendants Stephen Avilla ("Aviila"), Legal Aid Society of Santa Clara County ("Legal Aid"), and County of Santa Clara ("County").

The first cause of action against Legal Aid and the County alleges breach of a third party beneficiary contract. The second cause of action alleges a breach of statutory duty by the County. The third cause of action seeks quantum meruit recovery against the County, Legal Aid, and Avilla. The fourth cause of action alleges a violation of plaintiff's civil rights by Legal Aid and Avilla.

After plaintiff rested his case-in-chief, the court granted defendants' motion for judgment pursuant to Code of Civil Procedure § 631.8 as to the third cause of action for quantum meruit, and declined to render judgment as to the remaining causes of action.[18]

Following final briefing by the parties, the matter was deemed submitted to the court for decision on August 23, 2004, the date of filing of plaintiff's written rebuttal argument. On October 19, 2004, the Court issued its tentative decision in accordance with Code of Civil Procedure § 632 and California Rules of Court, rule 232. The tentative decision also directed plaintiff to prepare the statement of decision should one be requested.

On October 29, 2004, plaintiff filed a "Notice of Motion to Clarify Tentative Decision and Modify Judgment." On November 3, 2004, all defendants filed a request for a statement of decision relative to the first cause of action.

Plaintiff's motion to modify the judgment came on for hearing on November 19, 2004, and was denied as premature as there was not yet a judgment. On November 19, 2004, the court also indicated that it would treat plaintiff's motion to clarify as a request for a statement of decision relative to the fourth cause of action. Although not requested by the parties, the court will also include herein its reasoning on the second cause of action as stated in its tentative decision in the interest of having all of the court's

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[18]Defendants' motion for judgment with regard to the first, second and fourth causes of action became moot with the issuance of the Court's tentative decision.

rulings in one document.

III.

BREACH OF STATUTORY DUTY

Generally speaking, Penal Code § 987.2 provides for the costs of appointed counsel for indigent criminal defendants to be paid out of the general funds of the County. In essence, plaintiff argues that since he was entitled to payment and was not paid, the County has breached its duty under Penal Code § 987.2.

Penal Code § 987.2, however, not only imposes a duty to compensate appointed counsel on counties but also allows counties to discharge this duty in a certain way, including "by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid...." (Penal Code § 987.2, subdv. (b).). Thus, it follows that if a county fulfills its obligation in a manner approved by Penal Code § 987.2, the county has met its statutory duty. Here, the County has fulfilled its obligations under Penal Code § 987.2 by entering into an agreement with Legal Aid and by providing Legal Aid with the funds as agreed.

IV.

VIOLATION OF PLAINTIFF'S CIVIL RIGHTS

Plaintiff's fourth cause of action alleges that Avilla and Legal Aid violated plaintiff's rights under the First Amendment by retaliating against him for litigating his fees

dispute in court.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of law." (*West v. Atkins* (1988) 487 U.S. 42, 49.)

A. State Action

Defendants have asserted that plaintiff's fourth cause of action must fail because Legal Aid cannot be deemed a state actor. Two cases, *Graseck v. Mauceri* (2nd Cir. 1978) 582 F.2d 203 and *Lefcourt v. Legal Aid Society* (2nd Cir. 1971) 445 F.2d 1150, are instructive. Both cases involve the dismissal of a legal aid attorney and in both cases the federal court of appeals found that the dismissals were not performed under color of state law, notwithstanding the receipt of substantial government funds by the two organizations. As noted by the *Graseck* court, "[t]he similarities between Lefcourt and the facts before us are, not surprisingly, striking. The bylaws of both societies are almost identical, their respective contracts were made pursuant to the same New York law requiring the State to implement a plan for furnishing counsel to indigent defendants, they both receive substantial governmental funding (although the Society in Lefcourt evidently received some funds for its criminal division from private sources), they are both housed in government buildings, and, most importantly, there is no formal mechanism through which any governmental entity can exercise control or supervision over the internal operations of the societies." (*Graseck, supra*, 582 F.2d at 208 [citations and footnotes omitted].)

Similarly, it is undisputed that Legal Aid is a nonprofit private organization that entered into a contract with the County of Santa Clara to provide legal services for eligible persons. There is no governmental control or interference with the manner in which defendant Legal Aid conducts its internal operations. Particularly with regard to billing disputes, the contract between the County and Legal Aid provides no role whatsoever for the County. Indeed, specific to the dispute at bar, there is no evidence that there was any governmental intrusion, interference, encouragement, or input into Avilla's decision not to pay plaintiff. (See *Blum v. Yaretsky* (1982) 457 U.S. 991, 1004 [decisions of physicians and administrators of privately owned and operated nursing home to transfer Medicaid patients are not state action].) Accordingly, in the specific context of the fee dispute between Legal Aid and plaintiff, Legal Aid was not a state actor.

Plaintiff's reliance on *West v. Atkins, supra*, is misplaced. In *Atkins*, the United States Supreme Court found that a physician who contracts with the State of North Carolina to provide medical services to inmates at a state-prison hospital on a part-time basis acts "under color of state law." The decisive factor for the *Atkins* Court was that the inmate was a prisoner in "'close custody'" and, under North Carolina law, "was not free to employ or elect to see a different physician of his own choosing." (*Id.* At 44.)

Plaintiff here, however, does not stand in the same shoes as the inmate in *Atkins*. Plaintiff's situation is not similar to that of a person involuntarily in state custody with no other option for medical care other than that provided by the State. Indeed, plaintiff is free to accept or decline cases from Legal Aid. In addition to acquiring his own clients,

plaintiff can also avail himself to other sources, including organizations similar to Legal Aid in other jurisdictions.

B. Injury

Moreover, "a plaintiff must allege facts indicating that some official action has caused the plaintiff to be deprived of his or her constitutional rights – in other words, there is an injury requirement to state [a claim under § 1983]." (*Columbo v. O'Connell* (2nd Cir. 2002) 310 F.3d 115, 117.) Thus, while plaintiff need not show that he was actually silenced by the suspension of his payments, he is required to show that the defendants' actions had some actual, non-speculative chilling effect. There is no evidence that plaintiff refrained from the exercise of his First Amendment rights at all, or that plaintiff felt intimidated or restricted in any way. To the contrary, plaintiff appeared emboldened by Legal Aid's refusal to pay and his legal activities intensified.

Finally, where a plaintiff alleges that his First Amendment rights were violated, he or she is required to show "that the expressions which are alleged to have provoked the retaliatory action relate to matters of public concern." (*Huang v. Board of Governors of the University of North Carolina* (4th Cir. 1990) 902 F.2d 1134, 1140.) "And it is settled that a public employee's expression of grievances concerning his own employment is not a matter of public concern." (*Ibid.*) Here, plaintiff's lawsuit is simply a fee dispute and not a matter of a constitutional dimension. (See also *Connick v. Myers* (1983) 461 U.S. 138, 147 ["[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a

federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."])

V.

BREACH OF CONTRACT FOR THE BENEFIT OF A THIRD PARTY

A Third-Party Beneficiary

In his first cause of action, plaintiff alleges that he is a third-party beneficiary to the contract between the County and Legal Aid. The existence of a contract between the County and Legal Aid is not in dispute. Defendants, however, contend that plaintiff was not an intended beneficiary of this contract.

"A third party beneficiary may enforce a contract made expressly for his or her benefit. It is also true that a party not named in the contract may qualify as a beneficiary under it where the contracting parties must have intended to benefit the unnamed party and the agreement reflects that intent. The party claiming to be a third party beneficiary bears the burden of proving that the contracting parties actually promised the performance which the third party seeks. This remains largely a question of interpreting the written contract." (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 680 [citations omitted].)

Defendants argue that the County's intent in the contract was to provide an adequate defense for indigent persons and juveniles accused of crimes and therefore plaintiff's client, Mr. Mares, is the intended beneficiary.

under the contract, not plaintiff. Defendant's analysis is incorrect. An indigent criminal defendant's right to counsel is rooted in the United States Constitution, and not a benefit conferred by the County. The County's involvement in the process of appointed counsel is mandated by Penal Code § 987.2, which provides that appointed counsel "shall receive a reasonable sum for compensation and for necessary expenses" and that this sum "be paid out of the general fund of the county." (Penal Code § 987.2, subdv. (a).)

Clearly, the County entered into a contract with Legal Aid in order to meet the County's statutory obligation under Penal Code § 987.2. As Penal Code § 987.2 establishes "[t]he county's duty to compensate the attorney and the attorney's right to be compensated, "appointed attorneys are necessarily the intended beneficiaries of the contract in which the County entered into to discharge its statutory duty. (See *Martinez v. Socoma Companies* (1974) 11 Cal.3d 394, 400 [a person is a creditor beneficiary if the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee].)

Indeed, the contract itself sets forth detailed procedures and criteria concerning payments to appointed counsel. For example, paragraph XD of Exhibit 1 requires Legal Aid to "pay participating attorneys for their fees and their ancillary costs within 15 business days after submission ... of a valid authorization of claim for payments for legal services rendered and for ancillary services." Moreover, Exhibit F to the contract, entitled "Schedule of Cases Covered by this Agreement," specifically lists Mr. Mares' case and specifically mentions plaintiff by name as the attorney for Mr. Mares.

B. Failure to Perform

Legal Aid claims that it was justified in refusing to pay any of plaintiff's bills in the *Mares* case for work done since August of 1999, and that Legal Aid did not fail to comply with the terms of its contract with the County. The court disagrees.

First, Legal Aid challenges the bills as "unjustified, bloated, unreasonable, and obscene." The court, however, finds credible plaintiff's testimony that each of the bills at issue was for work actually done. The court further finds that, except for the time spent on collateral matters discussed below, each of the bills was for work reasonably necessary for the defense of Mr. Mares. The court notes that, prior to the fee litigation in the *German* case, Legal Aid accepted and paid bills submitted by plaintiff in the *Mares* case that were similarly described and categorized.

In addition to plaintiff's professional credentials, his stellar reputation among his peers, his lifelong dedication to his calling, and his many successes in defending homicide cases, the court also finds convincing the opinions of those who have worked with plaintiff with regard to his competence and thorough trial preparation. Finally, the surge of plaintiff's activities on the *Mares* case is reasonable and explainable in light of plaintiff having just completed four murder trials in the period immediately preceding the time frame at issue here.

It should be noted that Avilla's own testimony at trial acknowledged that some items in the disputed bills were valid. Yet, inconsistent with Avilla's practice of making interim payments for undisputed items pending review of

questionable ones, plaintiff has yet to be paid even for the work Avilla did not contest.

Legal Aid faults plaintiff for not engaging in a discussion of the *Mares* bills, but under its own written policies and procedures the impetus for an explanation of the questionable bills must come from Legal Aid. According to Legal Aid's own written guidelines which were incorporated into its contract with the County, Avilla was supposed to request that plaintiff "submit a detailed, written description of all work performed on the case or cases for the time period being reviewed," or to require that plaintiff "personally appear and answer questions about the billings submitted." (Exhibit D to Agreement between County of Santa Clara and the Legal Aid Society of Santa Clara County for provision of Conflict Services.) Yet, Legal Aid never asked for a discussion or an explanation concerning the disputed bills prior to this lawsuit. Legal Aid simply did not pay the bills. In fact, Legal Aid did not even directly inform plaintiff that it had decided not to pay the *Mares* bills. The only hint of Legal Aid's intention came by way of a footnote in a court brief filed in the *German* litigation, another case concerning another billing dispute.

Avilla and Legal Aid also argue that paragraph XD of Exhibit 1, which requires Legal Aid to "pay participating attorneys for their fees and their ancillary costs within 15 business days after submission ... of a valid authorization of claim for payments for legal services rendered and for ancillary services," is triggered only upon a determination that the submitted bills are valid. Therefore, according to Legal Aid and Avilla, they could sit on submitted bills for however much time they want as long as a determination of validity of the bills has not yet been made. While Legal Aid

and Avilla are correct that the 15 days deadline does not start to run until a determination that a submitted bill is valid, nothing in the contract and attached exhibits give Legal Aid carte blanche as to how much time it could take to review a submitted bill. On the contrary, paragraph XD of Exhibit 1, reflects a concern for prompt processing of submitted bills. Thus, it is reasonable to read the contract and attached exhibits as requiring Legal Aid either to pay or take review action within 15 days of submission. Legal Aid did neither. At the very least, the amount of time that Legal Aid may take to review a bill must be subject to a standard of reasonableness. The court finds that Legal Aid and Avilla did not act reasonably in this regard.

Additionally, Legal Aid blames its failure to follow its own guidelines on plaintiff for his actions in the German case for plaintiff's hostile attitude as reflected in the blistering letter about Avilla that plaintiff was circulating to Legal Aid's board of directors and selected members of the legal community in January of 2000. Plaintiff's behavior, however distasteful to Avilla at a personal level, does not excuse Avilla as the Attorney Coordinator from following Legal Aid's own procedures that were made part of its contract with the County. In fact, plaintiff's increasingly litigious propensity should be more of a reason for Avilla to "dot all the i's and cross all the t's." The court notes that, under Legal Aid's policies and procedures, "[f]ailure to submit the requested information within fourteen calendar days may result in mandatory suspension of the attorney involved until such time as the information is submitted." Moreover, following review of the questionable bills, Avilla would also have different disciplinary options at his disposal upon a finding that the billings were either inappropriate or insufficiently justified.

Avilla, however, did not avail himself to the tools at his disposal. Instead, Legal Aid basically encouraged plaintiff to file a lawsuit.

C. Remedy

The Court awards plaintiff all the hours he submitted for the work done on the *Mares* case from August through December of 1999, except for the time spent litigating the motion to dismiss for interference with Mr. Mares' rights and the time spent litigating with Legal Aid over interim fees. The court finds that these expenditures of time cannot be directly attributed to the defense of Mr. Mares, and consequently not necessary and/or reasonable. Moreover, the court finds the applicable rate to be $70.00 an hour. Accordingly, plaintiff is to recover from defendants County and Legal Aid the amount of $47,324.87. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 661 [A beneficiary "can sue either the promisor or the promisee, or may join them and obtain judgment against both...."]

VI.

DISCOVERY ISSUES

Defendants claimed they were unable to properly defend themselves because plaintiff objected to many discovery requested based on, *inter alia*, the client-attorney privilege. These discovery requests concern plaintiff's files and documents pertaining to the *Mares* case. As a result, Defendants assert that they "have been and are being prevented from accessing the underlying work to find out it was done, whether it can be documented (which goes to the

weight of the evidence that it was done), the reason for doing it, if performed, whether it was reasonable to perform the work, what documents resulted, and how the work was done ...." Relying on *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, defendants contend they are entitled to a dismissal of the action.

First, extensive intrusion into plaintiff's files is not required for the defense of many of plaintiff's causes of action, as evident by the verdict of the court. Many of the issues at trial are legal in nature. Other issues, such as the civil rights cause of action, focus more on defendants' conduct rather than that of plaintiff.

Second, *Solin v. O'Melveny & Myers, LLP* is inapplicable to the facts and issues at bar. In *Solin*, an attorney filed suit against a law firm, alleging that the defendant law firm misadvised him concerning matters connected with his representation of two clients involved in criminal proceedings. Thus, the resolution of the lawsuit necessarily involves what advice the attorney in turn gave to his clients after he had consulted with the defendant law firm. After the attorney's own clients objected to the disclosure of their privilege discussion, the trial court concluded that the defendant law firm could not effectively defend itself against the attorney's claims of malpractice without reference to and use of the clients' secrets. Consequently, the trial court dismissed the action. The court of appeal affirmed, finding the dismissal appropriate because the lawsuit was incapable of complete resolution without breaching the attorney-client privilege. (*Solin*, supra, 89 Cal.App.4th at 466.)

Here, the resolution concerning the reasonableness of

fees does not require the degree of intrusion sought by defendants. Indeed, the appropriateness of fee requests is routinely evaluated by the courts and by opposing counsel without the need to invade the client-attorney privilege, as many documents relevant to this inquiry do not fall within the scope of the privilege.

There was no opportunity, however, to discern what defendants were properly entitled to in this lawsuit because defendants failed to litigate (or failed to timely litigate) not only the appropriateness of plaintiff's assertions of privileges, but also the adequacy of their own requests. Such failure waives the right to receive any documents they were otherwise entitled to pursuant to their requests. (See *Vidal Sassoon, Inc. v. Superior Court* (1983) 147 Cal.App.3d 681, 685. See also *Professional Career Colleges, Magna Institute, Inc. v. Superior Court* (1989) 207 Cal.App.3d 490, 493-494 ["it would be an absurdity to say that a party who fails to meet the time limits of [code of civil procedure] section 2030 may avoid the consequences of his delay and lack of diligence by propounding the same question again. Such a construction of the statute would obviously encourage delay and provide no incentive to attempt to resolve any dispute with the opposing party. The Legislature has explicitly stated that unless a party moves to compel further response within 45 days of the unsatisfactory response, he waives any right to compel a further response.")

Otherwise, defendants would not only be permitted to disregard the civil discovery scheme, but also be allowed to choose their own remedy. Given this choice, no party would move to compel a further response. Instead, a propounding party would simply allow a seemingly unjustified objection to stand and then demand the ultimate sanction of dismissal.

Accordingly, defendants' request for a dismissal on discovery grounds is denied.

CONCLUSION

Plaintiff shall recover from the County and Legal Aid the amount of $47,324.87. Prejudgment interest is not awarded. (See *Wisper Corp. California Commerce Bank* (1996) 49 Cal.App.4th 948.)

DATED: December 7, 2004

JUDGE OF THE SUPERIOR COURT
THANG NGUYEN BARRETT

APPENDIX E

14th. Amendment to the U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,*(See Note 15)* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a

member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

California Penal Code § 987.2. Assigned counsel; compensation; public defenders; multiple county representation; recovery of costs

(a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel, and in which counsel is assigned in the superior court to represent the person in a criminal trial, proceeding, or appeal, the following assigned counsel shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county:

(1) In a county or city and county in which there is no public defender.

(2) In a county of the first, second, or third class where there is no contract for criminal defense services between the county and one or more responsible attorneys.

(3) In a case in which the court finds that, because of a conflict of interest or other reasons, the public defender has properly refused.

(4) In a county of the first, second, or third class where attorneys contracted by the county are unable to represent the person accused.

(b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of

supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in those cases.

(c) In counties that utilize an assigned private counsel system as either the primary method of public defense or as the method of appointing counsel in cases where the public defender is unavailable, the county, the courts, or the local county bar association working with the courts are encouraged to do all of the following:

(1) Establish panels that shall be open to members of the State Bar of California.

(2) Categorize attorneys for panel placement on the basis of experience.

(3) Refer cases to panel members on a rotational basis within the level of experience of each panel, except that a judge may exclude an individual attorney from appointment to an individual case for good cause.

(4) Seek to educate those panel members through an approved training program.

(5) Establish a cost-efficient plan to ensure maximum recovery of costs pursuant to Section 987.8.

(d) In a county of the first, second, or third class, the court shall first utilize the services of the public defender to provide criminal defense services for indigent defendants. In the event that the public defender is unavailable and the county and the courts have contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, the court shall utilize the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of a county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record.

(e) In a county of the first, second, or third class, the court shall first utilize the services of the public defender to provide criminal defense services for indigent defendants. In the event that the public defender is unavailable and the county has created a second public defender and contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, and if the quality of representation provided by the second public defender is comparable to the quality of representation provided by the public defender, the court shall next utilize the services of the second public defender and then the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the second public defender or a county-contracted attorney after

making a finding of good cause and stating the reasons therefor on the record.

(f) In any case in which counsel is assigned as provided in subdivision (a), that counsel appointed by the court and any court-appointed licensed private investigator shall have the same rights and privileges to information as the public defender and the public defender investigator. It is the intent of the Legislature in enacting this subdivision to equalize any disparity that exists between the ability of private, court-appointed counsel and investigators, and public defenders and public defender investigators, to represent their clients. This subdivision is not intended to grant to private investigators access to any confidential Department of Motor Vehicles' information not otherwise available to them. This subdivision is not intended to extend to private investigators the right to issue subpoenas.

(g) Notwithstanding any other provision of this section, where an indigent defendant is first charged in one county and establishes an attorney-client relationship with the public defender, defense services contract attorney, or private attorney, and where the defendant is then charged with an offense in a second or subsequent county, the court in the second or subsequent county may appoint the same counsel as was appointed in the first county to represent the defendant when all of the following conditions are met:

(1) The offense charged in the second or subsequent county would be joinable for trial with the offense charged in the first if it took place in the same county, or involves

evidence which would be cross-admissible.

(2) The court finds that the interests of justice and economy will be best served by unitary representation.

(3) Counsel appointed in the first county consents to the appointment.

(h) The county may recover costs of public defender services under Chapter 6 (commencing with Section 4750) of Title 5 of Part 3 for any case subject to Section 4750.

(i) Counsel shall be appointed to represent, in a misdemeanor case, a person who desires but is unable to employ counsel, when it appears that the appointment is necessary to provide an adequate and effective defense for the defendant. Appointment of counsel in an infraction case is governed by Section 19.6.

(j) As used in this section, "county of the first, second, or third class" means the county of the first class, county of the second class, and county of the third class as provided by Sections 28020, 28022, 28023, and 28024 of the Government Code.

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(3)

No. 06-1606

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In The

Supreme Court of the United States

STEPHEN AVILLA and LEGAL AID SOCIETY OF SANTA CLARA COUNTY,

Petitioners,

v.

JAMES McNAIR THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The Sixth District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:

> Is the legal aid corporation a "state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. § 1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?

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JURISDICTION

Petitioners assert that this Court has jurisdiction under 28 U.S.C. §1257(a). It appears that Petitioners' principal claim is that the State Court inappropriately applied well-settled tests for "state-action" within the meaning of 42 U.S.C. §1983, and therefore arrived at an erroneous factual conclusion that petitioners were engaged in state action at the time of their wrongful conduct.

COUNTER STATEMENT OF THE CASE

Respondent "has been practicing law since 1975 and is a bar certified specialist in criminal law. He has extensive experience in both the state and federal system representing defendants accused of murder. Two federal judges had appointed him to represent capital defendants under the federal 'learned counsel' statute." (Pet.App. 47a)

In 1996, Respondent was appointed by the Superior Court of the State of California, County of Santa Clara to represent Robert Lee Mares, who was charged with two counts of capital murder. (Pet.App. 4a) He had also been appointed by the same court to represent Geary German in an unrelated capital case. (Pet.App. 4a) During the pendency of these two cases, in 1997, the County of Santa Clara, which was obligated to pay fees to appointed counsel under California law (Penal Code §987.2), entered into a contract with Petitioner Legal Aid Society of Santa Clara County to administer such payments, and Legal Aid Society of Santa Clara County in turn hired Petitioner Stephen Avilla to be the coordinator of that program. (Pet. 5)

> "Through June 1999, Thompson submitted monthly bills for his work on the *Mares* case, and

> Legal Aid paid them. During that time, Thompson also submitted bills for his work in an unrelated murder-for-hire case called *People v. German*. Legal Aid reduced one of the *German* bills by thousands of dollars, and Thompson protested. He tried to resolve the dispute, but when his efforts failed, he filed a motion challenging the fee reduction. During the proceedings on the motion, Avilla indicated that it would be inappropriate to pay Thompson's bills because Thompson considered the court to be the proper forum for determining a reasonable fee. Ultimately, the court granted Thompson's motion and directed Legal Aid to pay him in the *German* case. Thereafter, from August to December 1999, Legal Aid declined to pay bills totaling $57,586.37 that Thompson submitted in the *Mares* case, which had ended in dismissal without prosecution. At trial, Antonio Estremera, directing attorney for Legal Aid, acknowledged that in his deposition, he testified that Avilla told him he was suspending payments to Thompson in the *Mares* case because of the fee dispute in the *German* case." (Pet.App. 4a-5a)
>
> "When his bills went unpaid, [Respondent] wrote a number of letters to Avilla, seeking and then demanding payment. He got no response and then filed a series of legal motions for payment and then this lawsuit." (Pet.App. 6a)

The trial court awarded Respondent damages as the third-party beneficiary of the contract between Legal Aid Society and the County of Santa Clara for payment of appointed counsel, but held against Respondent on his claim for damages under 42 U.S.C. §1983, which alleged that the Petitioners used their power to pay appointed counsel in the Mares case to retaliate against Respondent

for exercising his right to petition the Court for payment in the German case.(Pet.App. 2a-3a)

The Court of Appeal of the State of California, Sixth Appellate District reversed the trial court on the 42 U.S.C. §1983 cause of action, sending the case back to the trial court for trial thereon. (Pet.App. 29a)

SUMMARY OF ARGUMENT

Petitioners urge this Court to resolve a question which is premised on facts which have nothing to do with this case, and urge this Court to review the unpublished decision of the California Court of Appeal, Sixth Appellate District because Petitioners disagree with the factual determination of whether payment of court appointed counsel in California is a state function under California law. This is not an appropriate use of this Court's resources. (Rules of the Supreme Court of the United States, Rule 10.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Purported Question Presented Relies Upon An Incorrect Statement Of The Record Below

Petitioners contend that this case presents the question:

> A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a

> panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:
>
> > Is the legal aid corporation a 'state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. § 1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters? (Pet. i)

That question is premised upon the factual assertion that (1) the Petitioners "appoint . . . lawyers from a panel . . . " and (2) the lawyers representing indigent defendants are therefore "*its* [Petitioners'] appointed attorneys."

This would make Petitioners akin to a Public Defender's Office in California, or certain legal aid societies in New York, whereby the office is appointed to represent the defendant, and the office delegates this duty to one of its employees.

That is not the case here. As noted above, Respondent was appointed by the Court in both the German and Mares cases before Respondents had anything to do with administering payment of appointed counsel. Respondent was never "appoint[ed] . . . from a panel" by Petitioners, nor was Respondent ever "[Petitioners'] appointed counsel."

Petitioners struggle to turn a violation of Respondent's fundamental civil rights into a mere employment dispute, but since Respondent was neither employed by, nor in any contractual privity with, Petitioners, this argument is without merit.

It is for this reason that Petitioners' reliance on *Graseck v. Mauceri*, 582 F2d. 203 (2nd Cir. 1978) and *Lefcourt v. Legal Aid*, 445 F.2d 1150 (2d Cir. 1971) is misguided. As Petitioners concede, these two cases "held that legal aid societies, in dealing with their *employees as employees*, were not state actors sufficient to allow suit by an employee-lawyer under §1983." (Pet. 12-13, emphasis added.)

The State Court recognized that those cases are entirely different than the present case, holding "those cases involved managerial decisions concerning the composition of their staffs, which fell within the exclusive purview of the independent societies. Questions about whom an independent entity should hire and fire do not implicate the state's constitutional or statutory obligations. Those decisions are purely internal, employment matters, over which the institutions exercised exclusive, independent, and complete control." (Pet.App. 25a) Footnote 9 to the State Court Opinion further clarified, "The trial court also cited *Blum v. Yaretsky* (1982) 457 U.S. 991. There, the court concluded that decisions by private nursing homes concerning the transfer of Medicaid recipients did not involve state action because those decisions were based on independent medical evaluations, for which the state is not responsible. (*Id.* at p. 1006.) Here, however, the County is obligated to provide reasonable compensation for services rendered by appointed counsel and remains

ultimately responsible to ensure that function is performed." (Pet.App. 25a)

II. The Issue Which Lies At The Heart Of The Question Presented Is A Factual Issue Which Is Resolved By Reference To State Law Properly Decided By The State Courts

Petitioners asserted that they have presented this Court with the question, "Is the legal aid corporation a 'state actor,' therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. § 1983, [under certain circumstances] because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?" (Pet. i)

That is a factual question, which can only be resolved by reference to state law.

The State Court held:

> [T]he Sixth Amendment obligates the state to provide counsel to indigent criminal defendants. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342-343; *In re Williams* (1969) 1 Cal.3d 168, 174; *People v. Lara* (2001) 86 Cal.App.4th 139, 150 ["absolute duty to appoint counsel to represent an indigent defendant"].) In accordance with that constitutional mandate, Penal Code section 987 establishes procedures for the determination of indigency and appointment of counsel, and Penal Code section 987.2 requires that the state pay appointed counsel for their services. Indeed, in *Cunningham v. Superior Court* (1986) 177 Cal.App.3d 336 (rev. den. May 8, 1986), the court explained that "[i]t is a legitimate state function to assist the poor [citation], but, under the Constitution, this

> goal cannot be accomplished at the expense of one particular group of people. It is a denial of equal protection when the government seeks to charge the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons." (*Id.* at p. 348.) Thus, the court concluded that requiring a defense attorney to represent indigent defendant without compensation would violate his or her right to equal protection. (*Id.* at pp. 348-352.) Accordingly, we conclude that the appointment and payment of reasonable fees for services rendered by counsel are public functions. (Pet.App. 21a)

After noting that appointment and payment of counsel for indigent criminal defendants was a government function (Pet.App. 22a-23a), the State Court addressed Petitioners' complaint that if payment of appointed counsel is an exclusively state function, it is not a traditional state function.

> We also recognize that to make out a civil rights claim, one must show more than that a private actor is serving a public function. "[T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.' [Citations.]" (*Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 842, italics in original.)
>
> There are organizations and attorneys who provide – and have long provided – pro bono services for indigent criminal defendants. However, the Sixth Amendment and Penal Code section 987.2 impose exclusive duties on the state to appoint and pay for counsel when an indigent defendant comes to court unrepresented. And paying reasonable compensation when counsel is

> appointed is now the exclusive prerogative of the state.
>
> Legal Aid notes that before 1941, there was no provision for the payment of court-appointed counsel by the state, and appointed counsel often served without pecuniary compensation under their professional duty to defend the defenseless and oppressed. (See *Lascher v. State* (1966) 64 Cal.2d 687, 689.) Given this history, Legal Aid argues that the payment of appointed counsel is not a *traditional* public function. However, if paying appointed counsel reasonable compensation was not a traditional public function before 1941, it is now and has been since the enactment of former section 987a, the predecessor to section 987.2. (See stats. 1941, ch. 451, § 1.) (Pet.App. 23a-24a)

Thus, Petitioners complaint is that error occurred in the State Court consisting of erroneous factual findings or the misapplication of a properly stated rule of law. While Respondent disputes this assertion, even if the State Court did make an erroneous factual finding that payment of court appointed counsel is a traditional state function within the meaning of *West v. Atkins*, 487 U.S. 42 (1987)), or if it misapplied the correctly articulated rule of *West*, this is precisely the sort of issue disfavored in Rules of the Supreme Court of the United States, Rule 10.)

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

STEPHEN AVILLA, and LEGAL AID SOCIETY OF SANTA CLARA COUNTY,

Petitioners,

v.

JAMES MCNAIR THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Sixth District

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:

> Is the legal aid corporation a "state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. §1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?

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REPLY BRIEF FOR THE PETITIONERS

Petitioners Stephen Avilla and the Legal Aid Society of Santa Clara County respectfully file this Reply Brief to address new issues raised in Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

ARGUMENT

The Court of Appeals' holding that "paying appointed counsel reasonable compensation . . . is now and has been . . ." a traditional public function since 1941 [App. 23a-24a], and that performance of this function is now "the exclusive prerogative of the state . . ." [App. 23a] is one of the key holdings as to which relief is being sought by certiorari in this Court[1].

Respondent's Brief in Opposition treats this finding as if it was the equivalent of a finding of negligence or criminal intent, i.e., as a finding of fact specific to this case. Based on this premise, Respondent argues that this is just a dispute over a lower court factual finding, therefore beneath the attention of the Supreme Court and a waste of its resources (Resp. Brief

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1. Respondent incorrectly argues that this is the entire issue presented for decision in the Petition. To the contrary, Petitioners submitted substantial argument in their Petition, at heading I, pages 12 to 19, to the effect that the trial court used a correct test – the amount and nature of the state's involvement in the decisions about Respondent's fee claims – in finding in Petitioners' favor on this issue, that the Court of Appeals erred by using an inappropriate test – the "traditional and exclusive function test" -- and that had the correct test been applied, Petitioners would have been entitled to judgment.

in Opposition, pages 6-8).

To the contrary, this Petition presents an issue of "constitutional fact" – involving the determination of underlying socio-legal facts[2], applicable in all similar cases, which will decide the application of the constitutional power to regulate "state action." As such, this Petition deserves the attention of the Court.

One of Respondent's sub-premises is that whether this is a "traditional and exclusive function" of the state is a question of state law, which carries with it the implicit premise that findings on this issue could vary from state to state. To the contrary, the finding made by the Court of Appeals had no state-law-specific dimension, but turned on the general right to appointed counsel under the Sixth Amendment to the U.S. Constitution and **Gideon v. Wainwright**, 372 U.S. 335 (1963). All states must honor such rights, and thus, this is not a state-by-state issue.

In **Woman's Choice-East Side Women's Clinic v. Newman**, 305 F.3d 684 (7th Cir. 2002), the Court held that a national scope was required to determine an issue that called for a constitutional determination: "[C]onstitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that Stenberg [Stenberg v. Carhart,

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2. The most prominent finding of this nature is the determination that separate schools for members of minority races are inherently unequal. **Brown v. Board of Education**, 347 U.S. 483 (1954).

530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000)] demands." **Woman's Choice**, supra, at page 688. Similarly, the current matter requires a national resolution so that all actors may shape their conduct in light of a single, national standard

We submit that there are crucial differences between the adjudicative factual findings that are specific to an individual case and the kind of findings that have been made in the instant case, which require the Supreme Court to intervene.

As an example, the trial court held that the important question was the depth and breadth of state involvement in Petitioner Legal Aid's decision to withhold compensation from Respondent on the Mares defense. It found such involvement was nonexistent[3]. The question of the County's involvement in the decision, or even of its legal right to be involved in the decision, would be a question of "adjudicative fact," specific to this case. This determination would not affect or serve as a precedent in other cases involving other agencies with other legal, contractual, or factual relationships with the state.

On the other hand, the facts apparently found by

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3. The Court of Appeal decision conceded that there was substantial evidence to support the trial court's findings that Legal Aid was independent of the county; that the county had no contractual role in determining what to pay Respondent; and that the county had no involvement in Respondent's fee dispute with Legal Aid [App. 22a - 23a]. It is also notable that the Court of Appeals does not make reference to any trial court findings or any evidence offered by either party that was pertinent to the "traditional and exclusive state function" test.

the Court of Appeals – that providing payment to appointed indigent criminal defense counsel is and has been a traditionally exclusive state prerogative – are not "adjudicative" facts, specific to the dispute between Legal Aid and Respondent. Rather, they are "constitutional" facts which would apply to all similar cases.

The trial court made no finding on the "traditional and exclusive state function" test, because it did not find this test to be the applicable standard of decision. The Court of Appeals decided that the trial court used the wrong standard, not that it found the facts incorrectly. Having held that the trial court should have used a different standard, the Court of Appeals proceeded to find the underlying constitutional facts (that this function was traditional and exclusive) and then apply the standard it had found applicable.

We would suggest that the proper course of action upon determining that the trial court had used the wrong test, and made no findings of fact underlying a ruling on the correct test, was to send the case back to the trial court for further proceedings on that issue. At that point, the parties could have offered evidence on the subject and the record would be much clearer.

Assuming *arguendo* that it was proper for the Court of Appeals to find these facts as a matter of first impression, without any trial court evidentiary hearing, Petitioners submit that the Court of Appeals erred in the conclusion it reached about the "constitutional" facts. That is why this Petition ought to be granted and this case ought to be heard.

Constitutional facts involve factual determinations that transcend particular cases and are relevant to the formation of a constitutional rule or the application of a rule to similarly occurring cases. Adjudicative facts, in contrast, refer to factual determinations that are relevant to the application of constitutional rules in particular cases. See, Professor David L. Faigman "A Unified Theory of Constitutional Facts," The Berkeley Electronic Press 2006, page 18.

The issue of "state action" is obviously a constitutional issue. The dozens of cases cited by both sides on the "state action" issue conclusively refute the contention that this is an issue too trivial or too case-specific to consume the attention of this Court.

Professor Frank R. Strong, the author of American Constitutional Law, 1950, Chapter 4, Judicial Competency for Constitutional Determination, summarized the methods of constitutional fact finding as (1) "presentation at the judicial trial level through historic evidential procedures"; (2) "development of facts at the administrative level"; (3) "the presentation of factual data via briefs at the trial and/or appellate levels"; and (4) judicial notice. American Constitutional Law, supra, page 212.

The Court of Appeals did not apparently use any of these methods to find the constitutional facts which formed the basis for its ruling. It simply stated that this function was "traditional" enough, having been in place since the middle of the twentieth century, and then assumed the "exclusivity" portion of the test.

The Court of Appeals cited no precedent on this

latter issue [App. 23a] and simply said that the Sixth Amendment and California state law "impose exclusive duties on the state to appoint and pay for counsel." It gave no consideration to the actual exclusivity of such matters, which is clearly lacking.

An "exclusive" prerogative is one which only the state can perform, yet the Court of Appeals admitted [App. 23a] that there are organizations and attorneys who have long provided free services for indigent criminal defendants. Unless the lawyers for these organizations are working for them for free, the organizations are appointing and paying counsel to provide defense services to otherwise unrepresented indigent defendants. If the state's power to do so was "exclusive," then these organizations would be infringing on the state's prerogatives. That such organizations continue to fulfill this function shows that it is not exclusively a state function.

One way to look at an "exclusive prerogative" is to see whether the state can prevent others from performing it. How can a "prerogative" be "exclusive" if the state cannot assert its exclusivity by preventing others from performing the function? Yet in this case, it is clear that others do perform the same function, with the knowledge and encouragement of the state. In fact, it is clear that a state would have no power to prevent appropriate agencies from providing and paying lawyers for indigent criminal defendants.

The American Heritage Dictionary, 4th ed. (2000) defines "exclusive" as ". . . Not allowing something else; incompatible; 3. Not divided or shared with others; . . ." It defines "prerogative" as ". . . an exclusive right or

privilege held by a person or group; . . the exclusive right and power to command, decide, rule, or judge . . ."

Putting these together, an "exclusive prerogative" is a right, power, or privilege which is not possessed by others; rather, it is a single and sole right incompatible with exercise by others.

When the Court of Appeals assumed that this was an exclusive prerogative, it did so without substantial analysis and without referencing any of the types of sources discussed by the above commentators. There was no lower court evidentiary fact finding process, no factual or evidentiary support offered by way of the briefs, and no explicit reference to judicial notice. The Court of Appeals simply issued its fiat that the function in question is a traditional and exclusive prerogative of the state.

As argued in the initial Petition, the payment of appointed counsel is not a function that, when performed by independent contractors outside the control of the state, should be deemed to be "state action," and is not the traditional and exclusive prerogative of the state. The Court of Appeals erred in finding this Constitutional fact, and therefore, Petitioners ought to be entitled to a hearing before this Court and a reversal on this issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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